TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~633.~~ ~~363~~ ~~363~~ 163

ANN GREGORY, PLAINTIFF IN ERROR,

vs.

WILLIAM N. McVEIGH.

IN ERROR TO THE CORPORATION COURT OF THE CITY OF ALEXANDRIA, STATE OF VIRGINIA.

FILED OCTOBER 16, 1874.

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1, 2 *Title.*

VIRGINIA:

WM. N. MCVEIGH, PLAINTIFF,
vs.
ANN GREGORY, DEFENDANT. } In ejectment.

Pleas at the court-house in the city of Alexandria, before the corporation court for said city, on the 21st day of July, 1874.

Be it remembered, that heretofore, to wit, at rules held in the clerk's office of the said corporation court on the first Monday in March, 1874, came William N. McVeigh, by his attorney, and filed his declaration against Ann Gregory of a plea of trespass and ejectment; which declaration and the note thereunder written are in the words following, to wit:

3 *Declaration.*

ALEXANDRIA CITY, *to wit:*

In the corporation court of the city of Alexandria.

William N. McVeigh, plaintiff, complains of Ann Gregory for this, to wit: that whereas on the 30th day of March, 1861, to wit, at the city aforesaid, the said plaintiff was possessed of a certain parcel or tract of land, situate, lying, and being in the said city, described and bounded as follows: Beginning on the south side of Prince street, 127 feet 3 inches to the east of Pitt street; thence west 52 feet 3 inches on Prince street; thence south, parallel to Pitt street, 118 feet 4 inches to a ten-feet alley; thence east, parallel to Prince street, 52 feet 3 inches, and thence north, parallel to Pitt street, 118 feet 4 inches, to the beginning; of which said tract or parcel of land the said plaintiff was possessed and have right to in fee; and being so possessed thereof, the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at the city aforesaid, entered into and upon said land and unlawfully withholds the possession thereof from the said plaintiff, to the damage of said plaintiff in the sum of $200.00, and therefore he brings suit.

C. W. WATTLES, *p. q.*

Notice.

TO ANN GREGORY:

4 I, ———, hereby notify you that at the clerk's office of the corporation court of the city of Alexandria, Virginia, at the rules to be held for the said court on the first Monday in March, 1874, shall file a declaration in ejectment against you, a true copy whereof is hereto annexed.

Given under my hand this 26th day of February, 1874.

WM. N. MCVEIGH,
By his counsel, C. W. WATTLES.

Statement of mesne profits.

Statement of mesne profits filed with above declaration.

Amount of rent, at the yearly value of $400, for five years previously to the commencement of this suit, in all, $2,000, being the amount which

the said plaintiff means to demand for the use of the land in the above declaration mentioned.

WM. N. McVEIGH,
By his counsel, C. W. WATTLES.

Return.

Executed by delivering a copy of the within declaration and notice to the defendant, Ann Gregory, on the 28th day of February, 1874, and explaining to said defendant the purport of the same.

W. D. STEWART, *D. S.*,
For JAMES M. STEWART, *Sergeant.*

5 *Common order.*

And it appearing by the return that the said Ann Gregory hath been duly served with a copy of the said declaration, and the note thereunder written; and she not appearing, on the motion of the plaintiff, by his attorney, it is ordered that unless the said Ann Gregory do appear here at the next rules and plead the general issue in the declaration supposed, that judgment shall be given for the plaintiff, and a writ of possession awarded him.

Thereupon a rule was awarded against the defendant, which, with the endorsements and return thereon made, is in the words & figures following, to wit:

Rule to plead.

The commonwealth of Virginia to the sergeant of the city of Alexandria, greeting:

We command you to summon Ann Gregory, if she be found within your bailiwick, to appear at the clerk's office of our corporation court for our said city of Alexandria, at the rules to be holden for said court, on the first Monday in April next, and plead to a declaration in ejectment filed, with the proof of service of notice thereof, by Wm. N. McVeigh, and have then there this writ.

Witness Morton Marye, clerk of our said court, at the court-
6 house of said city, the 31st day of March, 1874, and in the 98th year of the commonwealth.

MORTON MARYE.

Return.

Executed the within summons by delivering a copy of the same to Ann Gregory April 3d, 1874.

W. D. STEWART, *D. S.*,
For JAS. M. STEWART, *Sergeant.*

Common order confirmed & enquiry awarded.

And at another day, to wit, at rules held in the clerk's office of said corporation court on the first Monday in April, 1874:

The defendant still failing to appear and plead the general issue in the declaration supposed, on the motion of the plaintiff, by his attorney, the last order entered in this case is confirmed, and a writ of enquiry awarded, to be tried at the then next term of said court.

And at another day, to wit, at a corporation court held for said city, at the court-house aforesaid, on the 23d day of April, 1874:

Plea.

7 This day came the parties, by their attorneys, and the defendant pleads not guilty, and of this she putteth herself upon the country, and the plaintiff likewise, and issue is joined, and the trial of this issue is continued for the defendant to the July term next of this court.

Jury, verdict, & judgment.

And now, at this day, to wit, at a corporation court held for said city, at the court-house for said city, on the 21st day of April, 1874:

This day came the parties, by their attorneys, and thereupon came a jury, to wit: I. T. Beckham, John Soper, Jno. Lally, James Eveleth, George Johnston, Thomas Dewitt, H. C. Field, James C. Nevitt, Anthony Dugan, John M. Clowes, John S. Greene, and W. C. Brenner, who were sworn to try the issue joined, and having heard the evidence and arguments of counsel, upon their oath do say, "We, the jury, find the issue joined for the plaintiff, and we find that the defendant is guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration mentioned; and we further find that the plaintiff is entitled in fee-simple to the premises in the declaration mentioned." Whereupon,

8 by consent of parties, the same jury were sworn diligently to enquire of damages in this case, and having heard the evidence and arguments of counsel, upon their oath do say: "We, the jury, sworn to assess the damages for five years and three months, being up to time of verdict previous to the institution of this suit, for the occupation of the premises in the declaration mentioned by the defendant, assess the same at fifteen hundred and thirty-two dollars."

Therefore, it is considered by the court that the plaintiff recover against the defendants his fee-simple to the premises in the declaration mentioned, together with the sum of fifteen hundred and thirty-two dollars, damages assessed as aforesaid, with interest thereon from the 21st day of July, 1874, till paid, and his costs by him about his suit in this behalf expended.

Whereupon, on the motion of the plaintiff, a writ is awarded him, directed to the sergeant of this city, to cause him to have his possession of his fee-simple in the premises aforesaid; whereupon, on the motion of the defendant, execution upon this judgment is stayed for 60 days, to allow time to apply for a writ of supersedeas, upon her giving bond

9 within ten days, in the sum of $500, conditioned according to law.

Memorandum.—Be it remembered that, upon the trial of this cause, the defendant excepted to certain rulings of the court, and tendered her bill of exceptions, which she prayed might be signed, sealed, enrolled, and made part of the record in this cause, which was accordingly done; which exceptions are in the words following:

Exceptions by def't.

Corporation court, Alexandria.

WM. N. MCVEIGH
v.
ANN GREGORY.

Be it remembered that on the trial of the issue joined on the plea of not guilty, in this case, the plaintiff, to maintain the issue on his part,

proved that in the year 1852 he purchased the premises in the declaration mentioned, of a person having title thereto in fee-simple, and entered upon the possession thereof, and became seized thereof in fee, and that he had never been voluntarily parted with the title thereto; and he further proved that the defendant was in possession of the said premises before and at the time of the institution of this suit; & there the plaintiff rested.

Thereupon, the defendant, to maintain the issue on her part, proved, and offered in evidence the record of the sentence and decree
10 of condemnation of the U. S. district court for the eastern district of Virginia, and the sale and deed by the marshal for the said district thereunder, which said record and deed are as follows, to wit:

11 *Record & decree of condemnation, sale, &c.*

ORDER OF SEIZURE.

OFFICE OF U. S. DISTRICT ATTORNEY
FOR THE EASTERN DISTRICT OF VIRGINIA,
Norfolk, Va., July 20, 1863.

To the marshall of the United States for the eastern district of Virginia:

In compliance with general instructions issued by the Attorney-General under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," I have to direct that you seize the lot of land on Prince street, between Pitt and Royal streets, in the city and county of Alexandria, Va., on which stands two three-story brick dwelling-houses, numbered 96 & 98, and bounded as follows: Beginning on the south side of Prince street, supposed to be one hundred and twenty-seven feet three inches to the east of Pitt street; thence westerly fifty feet on Prince street; thence southwardly, parallel to Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence eastwardly, parallel to Prince street, fifty feet; thence
12 northwardly one hundred and eighteen feet four inches to the beginning; together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any wise appertaining, and all right, title, interest, and estate of William N. McVeigh therein, as proceedings are to be instituted to secure the *consideration* of the same to the use of the United States under the above-entitled act. You will report the seizure to me when the same shall have been made.

L. H. CHANDLER,
U. S. District Attorney.

Endorsement:

ORDER OF SEIZURE.

UNITED STATES MARSHALL'S OFFICE,
Alexandria, July 20, 1863.

I certify that I have seized the within-described property, and given notice to (No. 96) Garrett Hust, (No. 98,) Edward S. Hough, the tenants in possession, as within directed.

JAMES T. CLOSE,
U. S. Marshall.

Recorded.

13 *Libel of information.*

To the judge of the district court of the United States for the eastern district of Virginia:

This is the libel of information of L. H. Chandler, United States attorney for the eastern district of Virginia, in behalf of the Government of the United States against all that certain piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situated on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; then easterly, parallel with Prince street, fifty feet, and thence northerly one hundred and eighteen feet four inches to the place of beginning, being the same lot on which stands two dwelling-houses, numbered "96" and "98," together with all the improvements, buildings, rights, privileges, appurtenances, and other
14 hereditaments to the same belonging or in any wise appertaining, and against all persons lawfully intervening for their interest therein. And thereupon the said L. H. Chandler, United States attorney as aforesaid, doth allege and articulately propound as follows:

1. That certain States forming a part of the territory and constituting a part of the Government of the United States, and specifically enumerated by the President of the United States in his proclamation duly issued and bearing date the first day of July, A. D. eighteen hundred and sixty-two, are engaged in armed rebellion against the lawful authority of the United States.

2. That by the act of the Congress of the United States, approved the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," provision was made for the seizure and confiscation of the property of persons engaged in armed rebellion against the authority of the United States as therein set forth.

15 3. That the President of the United States did, on the twenty-fifth day of July, in the year of our Lord eighteen hundred and sixty-two, issue his proclamation naming all persons within the contemplation of the sixth section of the said act of Congress of July 17, A. D. 1862, to cease from participating in aiding, countenancing, and abetting the existing rebellion against the Government of the United States, as provided for by said act.

4. That William N. McVeigh, on the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was, and previously thereto had been, the owner of real estate in the said city and county of Alexandria, described as follows: All that certain piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situate on Prince street, between Pitt and Royal streets, and bounded as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel
16 with Prince street, fifty feet, and thence northerly one hundred and eighteen feet four inches to the place of beginning; being the same lot on which stands two dwelling-houses, numbered "96" and "98," together with all the improvements, buildings, rights, privileges, appur-

tenances, and other hereditaments to the same belonging or in any wise appertaining.

5th. That the said William N. McVeigh, subsequently to the said seventeenth day of July, in the year of our Lord one thousand and eight hundred and sixty-two, held and exercised an office and agency of honor, trust, and profit under the government of the so-called Confederate States and under one of the said States of said confederacy, and under the laws thereof; and that the said William N. McVeigh accepted the appointment and was elected to said office and agency after the date of the pretended ordinance of said State, and did take an oath of allegiance to and to support the constitution of the so-called Confederate States.

17 6. That the said William N. McVeigh, owning property in the said city and county of Alexandria as aforesaid, has since the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, assisted and given aid and comfort to the rebellion and to those engaged in the rebellion against the lawful authority and against the Government of the United States, in this, that the said William N. McVeigh did, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, and at various other times between that date and the date of the filing of this libel of information, give aid and comfort to said rebellion by acting as a soldier, and as an officer, and as a non-commissioned officer in the army and navy of the so-called Confederate States, and by contributing money and property to the aid and encouragement of those engaged in the rebellion against the lawful authority of the United States and to the government of the so-called Confederate States.

18 7. That the said William N. McVeigh, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was engaged in armed rebellion against the Government of the United States, and in aiding and abetting such rebellion, and notwithstanding that the President of the United States, on the twenty-fifth day of July, eighteen hundred and sixty-two, did issue his proclamation as aforesaid, naming all persons within the contemplation of the sixth section of the said act of Congress of July the seventeenth, eighteen hundred and sixty-two, to cease participating in aiding, countenancing, and abetting such rebellion, the said William N. McVeigh did not, within sixty days after the said proclamation was duly given and made, cease to act, countenance, and abet such rebellion, and did not return to his allegiance to the United States.

8. That the said property herein described has been seized by the United States marshal for the eastern district of Virginia, in compliance with instructions issued by the Attorney-General to the district

19 attorney of the United States, and by virtue of the fifth section of the act approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

9. That by reason of the premises the property herein described became and was forfeited to the United States, and ought to be condemned to their use.

Wherefore prayer is hereby made to your honor that process of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day, to be therein named, to appear and answer this libel of information; and the owner of said property being absent and non-resident, prayer is further made for order

of publication in the usual form, and for such further and other relief as to law and justice may appertain and as this court is competent
20 to give in the premises.

August 25th, 1863.

L. H. CHANDLER,
U. S. Attorney.

(Endorsement:) No. 17. U. S. district court for Eastern Virginia, at . United States vs. Lot of land in the city and county of Alexandria, and situate on Prince st., between Pitt and Royal sts., and bounded as follows: Beginning at the south side of Prince st., and running westerly on Prince st. 50 ft., thence southerly, parally with Pitt st., 118 ft. 4 in. to a 10-ft. alley, thence easterly, parallel with Prince st., 50 ft., thence northerly 118 ft. 4 in. to the beginning, being the same lot on which stand two dwelling-houses, numbered 96 & 98, (William N. McVeigh.) Libel of information.

21 District court of the United States for the eastern district of Virginia.

THE UNITED STATES
vs.
LOT OF LAND IN THE CITY AND COUNTY OF Alexandria, &c., situated on Prince st., between Pitt and Royal sts., and bounded and described as follows, to wit: Beginning at the south side of Prince st. and running westerly on Prince st. 50 ft.; thence southerly, parallel on the line with Pitt st., 118 ft. 4 inches to a 10-ft. alley; thence easterly, parallel with Prince st., 50 feet; thence northerly 118 ft. 4 inches to the place of beginning; being the same lot on which stand two dwelling-houses numbered 96 & 98, (William N. McVeigh.) } Confiscation.

On reading and filing the libel in this case, the court orders process of monition issue as prayed, and appoints the first Monday of October, 1863, and the court-room in the city of Alexandria, as the time and place of trial of this cause; and also orders that notice of said time and place of trial and of the substance of said libel be given by publication thereof in the Alexandria News, a newspaper published in the
22 city of Alexandria, and also by posting up the same at the court-house door, and that proclamation of the pendency of the suit be made by the marshall at the court-house door two times weekly until the day of trial.

JOHN C. UNDERWOOD,
Dist. Judge.

(Endorsement:) No. 17. United States vs. Lot of land in the city and county of Alexandria, &c., situate on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince st., and thence running westerly on Prince st. 50 ft.; thence southerly, parallel with Pitt street, 118 ft. 4 inches to a ten-ft. alley; thence easterly, parallel with Prince street, 50 ft.; thence northerly 118 ft. 4 inches to the place of beginning; being the same lot on which stands two dwelling-houses, numbered 96 & 98, (William N. McVeigh.) Returnable 1st Monday October, 1863.

23 *Monition.*

The President of the United States to the marshall for the eastern district of Virginia, greeting:

You are hereby commanded to give public notice at least fourteen days before the day of trial hereinafter mentioned, by advertisement in the Alexandria News, a newspaper published in the city of Alexandria, and by posting up a notification at the court-house door of the district court for the eastern district of Virginia, in the city, and by proclamation at said custom-house door twice a week till the day of trial aforesaid, that L. H. Chandler, attorney of the United States for said district, has caused all that certain piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situated on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel with Prince street, fifty
24 feet; and thence northerly one hundred and eighteen feet four inches to the place of beginning, being the same lot on which stand two dwelling-houses numbered "96 and 96," to be seized by you as forfeited to the United States. That he did, on the 26th day of August, 1863, file in the clerk's office of said district court a libel of information, on behalf of the United States, against the said lot and against all persons lawfully intervening for their interest therein, and for the causes in said libel set forth, praying for condemnation of the same to the use of the United States, and that said court has appointed the first Monday of October, 1863, and the court-room in the said city as the time and place for the trial of said cause, when and where all persons interested in said lot, or claiming an interest therein, may appear and make allegation in that behalf. Herein fail not, and make return of this warrant into said clerk's office, without delay, so endorsed as to show the time and manner of its execution by you.

25 Witness the honorable John C. Underwood, United States district judge for the eastern district of Virginia, this 27th day of August, A. D. 1863.

WM. H. BARRY, *Clerk.*

(Endorsement:) No. 17. The United States vs. Lot of land in the city and county of Alexandria, situate on Prince st., between Pitt and Royal sts., and bounded and described as follows, to wit: Beginning at the south side of Prince street, thence running westerly on Prince st. 50 feet; thence southerly, parallel with Pitt st., 118 ft. 4 in. to a 10-ft. alley; thence easterly, parallel with Prince st., 50 ft.; thence northerly 118 ft. 4 in. to the place of beginning; being the same lot on which stands two dwelling-houses, numbered "96" and "98." (William N. McVeigh.) Monition returnable 1st Monday Oct., 1863; issued August 27, 1863.

I hereby certify that I have caused the notice to be published, posted, and proclaimed, as herein commanded.

Alexandria, Oct. 5th, 1863.

JAMES T. CLOSE,
U. S. Marshall Eastern Dist. of Va.

26 *Notice of seizure.*

District court of the United States for the eastern district of Virginia.

To all whom it may concern, greeting:

Notice is hereby given that on the 20th day of July, 1863, all that certain piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situate on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel with Prince street, fifty feet, and thence northerly one hundred and eighteen feet four inches to the place of beginning; being the same lot on which stand two dwelling-houses, numbered "96" and "98," was seized by the marshall of the United States for said district, as forfeited to the use of the United States; and the same is libelled, as prosecuted in this court, in the name of the United
27 States, for condemnation for causes in said libel set forth; and that said cause will stand for trial at the court-room in the city of Alexandria on the first Monday of October next, when and where all persons are warned to appear to show cause why condemnation should not be declared, and to intervene for their interests.

WM. H. BARRY, *Clerk.*

Dated September 10, 1863.

(Endorsement:) No. 17. United States vs. All the right, title, &c., Wm. N. McVeigh. Notice of seizure and libel, and time and place of trial.

28 *Proof of publication of notice.*

District court of the United States for the eastern district of Virginia.

David Turner, the city and county of Alexandria, being duly sworn, deposes and says that he is one of the publishers and proprietors of the Alexandria News, a daily newspaper published in the city of Alexandria, and that a notice, of which the annexed is a true and correct copy, was published in said newspaper fourteen days prior to the 1st Monday of October, 1863, the first insertion being on the 14th day of September, 1863, and the last on the 30th day of September.

DAVID TURNER.

Fee for publication, $.

Subscribed and sworn to before me this 5th day of October, 1863.

W. H. BARRY, *Clerk.*

District court of the United States for the eastern district of Virginia.

To all whom it may concern, greeting:

Notice is hereby given that on the 28 day of July, 1863, all that certain piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situated on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence south, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel with Prince street, fifty feet; thence northerly one hundred and eighteen feet four inches to the place of beginning; being

the same lot on which stand two dwelling-houses, numbered "96" and "98," was seized by the marshall of the United States for said district, as forfeited to the use of the United States; and the same is libelled and prosecuted in said court in the name of the United States for condemnation, for the causes in said libel set forth; and that said cause will stand for trial at the court-room, in the city of Alexandria, on the first Monday of October next, when and where all persons are warned to appear, to show cause why condemnation should not be decreed, and to intervene for their interests.

Dated September 10, 1863.

WM. H. BARRY, *Clerk.*

Sep. 14, d. 15t.

NOTE.—The above is a copy of the newspaper advertisement, which is in words the same as the notice of seizure, which notice constitutes part of this record.—COPYIST.

29 (Endorsement:) No. 17. United States *vs.* All the right, title, &c., Wm. N. McVeigh. Proof publication of notice.

30 *Notice to strike from files answers.*

UNITED STATES
vs.
ALL THE RIGHT, TITLE, &C., WILLIAM N. McVeigh. } No. 17. Confiscation.

It appearing from the answer that has been filed in this cause that the said respondent, William N. McVeigh, is, and at the time of the filing of same was, a resident of the city of Richmond, within the confederate lines, and a rebel, L. H. Chandler, attorney for the United States, moves that the said claim and answer, and the appearance of Mess. Beach & Bradley, interposed on behalf of the said William N. McVeigh, be stricken from the files.

(Endorsement:) No. 17. United States vs. All the right, title, &c., Wm. N. McVeigh. Motion to strike from files answers.

31 *Order to strike from files answers, &c.*

UNITED STATES
vs.
ALL THAT CERTAIN PIECE, PARCEL, OR LOT OF land in the city and county of Alexandria, in the eastern district of Virginia, situate on Prince street, between Pitt and Royal sts., and bounded and described as follows, to wit: beginning at the south side of Prince st., and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel with Prince st., fifty feet; and thence northerly one hundred and eighteen feet four inches, to the place of beginning, being the same lot on which stand two dwelling-houses numbered "96" and "98." William N. McVeigh. } No. 17. Confiscation.

And now came on to be heard the motion of L. H. Chandler, attorney for the United States, libellants herein, to strike from the files the an-

swer, claim, and appearance interposed by Messrs. Beach & Bradley, for and in behalf of respondent, William N. McVeigh, and, on motion of said L. H. Chandler, the application of libellants is granted, and it is ordered that the answer and claim interposed in this suit by said Messrs. Beach & Bradley has been irregular and improperly admitted on file in this cause, and the same be stricken therefrom.

(Endorsement:) No. 17. United States vs. All the right, title, &c., Wm. N. McVeigh. Order to strike from files answers, &c.

Decree.

At a special term of the district court of the United States of America for the eastern district of Virginia, held at the court-room, in the custom-house building in the city of Alexandria, on Thursday, the tenth day of March, in the year of our Lord one thousand eight hundred and sixty-four.

Present—The honorable John C. Underwood, district judge.

UNITED STATES
vs.
ALL THAT CERTAIN PIECE, PARCEL, OR LOT OF land in the city and county of Alexandria, in the eastern district of Virginia, situated on Prince st., between Pitt and Royal sts., and bounded and described as follows, to wit: beginning on the south side of Prince st., and thence running westerly on Prince st. fifty feet; thence southerly, parallel with Pitt st., one hundred and eighteen feet four inches, to a ten-feet alley; thence easterly, parallel with Prince st., fifty feet; and thence northerly one hundred and eighteen feet four inches to the place of beginning, being the same lot on which stand two dwelling-houses, numbered "96" and "98." William N. McVeigh. } No. 17. Confiscation.

The papers in this cause having been heretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and notwithstanding said default, witness having been called and examined by L. H. Chandler, attorney for the United States, and due deliberation being had on the pleadings and proofs, it is thereupon, on motion of the said L. H. Chandler, ordered, adjudged, sentenced, and decreed, that the real and personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States. And upon like motion it is further ordered, adjudged, and decreed, that the clerk of this court issue a decree of venditioni exponas to the marshall of the district returnable upon the 16th day of April next, and that the said marshall, after having given at least twenty days' notice of the time, place, and terms of sale, by publication thereof in the Virginia State Journal, published in the city of Alexandria, sell the said property at public sale for cash to the highest bidder, and execute a deed for the real estate to the purchaser, and bring the proceeds of said sale into this court for its action thereon.

JOHN C. UNDERWOOD,
District Judge.

(Endorsement:) No. 17. United States vs. All the right, title, &c., William N. McVeigh. Decree.

Venditioni exponas.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The United States of America to the marshal of the eastern district of Virginia, greeting:

Whereas a libel was filed in the district court of the United States for the eastern district of Virginia, at Alexandria, on the 26th day of August, in the year of our Lord one thousand eight hundred and sixty-three, by L. H. Chandler, United States district attorney for said district, against all that certain piece, parcel, or lot of land in the city and
36 county of Alexandria, in the eastern district of Virginia, situated on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and thence running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence easterly, parallel with Prince street, fifty feet; and thence northerly one hundred and eighteen feet four inches to the place of beginning, being the same lot on which stand two dwelling-houses numbered "96" and "98," praying that the same be condemned and sold in the said libel alleged. And whereas the said real estate has been attached by the process issued out of the said district court in pursuance of the libel, and is now in custody by virtue thereof, and such proceedings have been thereupon had that, by the decree of the said court in this cause made and pronounced on the 10th day of March, in the year of our Lord one thousand and eight hundred and sixty-four, the said real estate was condemned and ordered to
37 be sold by you, the said marshal, after giving twenty days' notice of such sale, according to law, by publication thereof in the Virginia State Journal, published in the city of Alexandria, and in the Republican, published in the city of Washington, D. C.:

Therefore, you, the said marshal, are hereby commanded to cause all the right, title, interest, and estate of William N. McVeigh in and to said real estate so condemned and ordered to be sold in the manner and form, upon the notice, and at the time, place, and upon the terms by law required, and that you have the money accruing from said sale in said court, at Alexandria, on the 16th day of April, eighteen hundred and sixty-four, and that you then pay the same to the clerk of this court, and have you also then and there this writ.

Witness the honorable John C. Underwood, judge of the said court, at the city of Alexandria, in the eastern district of Virginia, this 16th day of March, in the year of our Lord one thousand eight hundred and sixty four, and of our Independence the eighty-eighth.

[L. S.] WM. H. BARRY, *Clerk.*

38 (Endorsement:) No. 17. District court of the United States, eastern district of Virginia. United States vs. All right, title, &c., Wm. McVeigh. Vend. exp. Amount due, $. Costs: printer's fee, ; collect, . Decree rendered March 10, A. D. 1864. Return-day, April 16, 1864.

39 *Order to put purchaser in possession.*

At a special term of the district court of the United States of America

for the eastern district of Virginia, held at the court-room in the custom-house building, in the city of Alexandria, on Thursday, the 12th day of May, in the year of our Lord one thousand eight hundred and sixty-four; present, the honorable John C. Underwood, district judge.

UNITED STATES
vs.
ALL THAT CERTAIN PIECE, PARCEL, OR LOT of land in the city and county of Alexandria, in the eastern district of Virginia, situate on Prince street, between Pitt and Royal streets, and bounded and described as follows, to wit: Beginning at the south side of Prince street, and running westerly on Prince street fifty feet; thence southerly, parallel with Pitt street, one hundred and eighteen feet four inches to a ten-feet alley; thence parallel to Prince street fifty feet; and thence northerly one hundred and eighteen feet four inches to the place of beginning, being the same lot on which stand two dwelling-houses numbered "96" and "98," Wm. N. McVeigh. } No. 17. Confiscation.

40 On motion of Charles N. Gregory, the purchaser of the interest of William N. McVeigh in and to part of the property described in the above-entitled suit, to wit: All that piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situated on the south side of Prince street, between Pitt and Royal streets, and on which stands the three-story brick house numbered (98) ninety-eight.

This ordered by the court: that the marshall of this court put the said Charles N. Gregory in possession of the above-described premises.

JOHN C. UNDERWOOD,
District Judge.

Copy to marshall May 12, 1864.

(Endorsement:) No. 17. United States vs. All the right, title, &c., William N. McVeigh. Order to put purchaser in possession.

41 No. 17. Confiscation. District court of the United States, eastern district of Virginia, clerk's office.

IN THE MATTER OF THE UNITED STATES
vs.
ALL THE RIGHT, TITLE, &C., WM. N. McVeigh. } Confiscation.

EASTERN DISTRICT OF VIRGINIA, *ss:*

I hereby certify that the accompanying is a true and correct copy of the original papers in the above-entitled cause now on file in this office.

In witness whereof I have hereunto set my hand and affixed the seal of the said court at the city of Richmond, in said district, this 2nd day of February, A. D. 1874.

[L. S.

ED. J. UNDERWOOD,
Clerk U. S. D. C. East. Dist. Va.

42

43 This deed, made this eleventh day of April, in the year of our Lord one thousand eight hundred and sixty-four, between John Underwood, as United States marshal for the eastern district of Virginia, of the first part, and Charles N. Gregory, of the city and county of Alexandria, State of Virginia, of the second part, witnesseth, that whereas, on the twentieth day of July, 1863, the attorney of the United States for said district, under the act of Congress of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," issued an order to the marshal of the United States, directing the seizure of the hereinafter-described property; and whereas the marshal of the United States for said district, on the twentieth
44 day of July, 1863, did seize the said property and make return thereof to the attorney of the United States for the district aforesaid; and whereas the attorney of the United States thereafterwards, on the twenty-sixth day of August, 1863, filed a libel of information against said property in the district court of the United States for said district; and whereas, after due notice and publication of such proceedings according to law, the said court, on the tenth day of March, 1864, did, by its decree, confiscate and condemn the said property as forfeited to the United States, and ordered the sale thereof; and whereas a writ of venditioni exponas was issued by said court to the marshal of the United States for the district aforesaid, commanding the sale of said property; and whereas, after due publication according to law and the decree of said court of the time, terms, and place of sale, the said property, on the eleventh day of April, 1864, was
45 sold to the said Charles N. Gregory, the party of the second part, he being the highest bidder therefor, for the sum of fifteen hundred dollars: Now, therefore, the said John Underwood, as marshal as aforesaid, the party of the first part, in consideration of the premises and of the full payment of the said purchase-money, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell, and convey unto the said Charles N. Gregory, the party of the second part, his heirs, executors, administrators, and assigns, the following-described property, to wit: all that piece, parcel, or lot of land in the city and county of Alexandria, in the eastern district of Virginia, situated on the south side of Prince street, between Pitt & Royal streets, and on which stands the three-story brick house numbered (98) ninety-
46 eight, together with all the appurtenances hereditaments to the same belonging or in any wise appertaining. Meaning and intending hereby to convey all such right, title, interest, and estate of Wm. N. McVeigh, in and to said property, as could be liable to confiscation and was confiscated under the said decree of the said court, whether the same is in fee or a life estate.

In testimony whereof the said party of the first part, as marshal as aforesaid, has hereunto set his hand and affixed his seal on the day and year first hereinbefore written.

JOHN UNDERWOOD, [SEAL.]
U. S. Marshal for Eastern District of Va.

Signed, sealed, and delivered in presence of—
ROBT. BELL.

STATE OF VIRGINIA, *County of Alexandria, to wit:*

I, Robert Bell, a justice of the peace for the county aforesaid
47 in the State of Virginia, do certify that John Underwood, whose name is signed to the writing above, bearing date on the eleventh

day of April, 1864, has acknowledged the same before me in my county aforesaid.

Given under my hand this 29th day of April, 1864.

ROBT. BELL,
Justice of the Peace.

STATE OF VIRGINIA,
Alexandria County Court:

CLERK'S OFFICE, *April 29th*, 1864.

This deed was received in the office, and having been acknowledged before a justice, admitted to record.

Teste:

JEFFERSON TACEY, *Clerk.*

48

49 The premises described in said record and deed are the premises demanded in the declaration.

There the defendant rested.

And thereupon the defendant moved the court to instruct the jury as follows:

"That the said sentence and decree of condemnation and sale, and the said sale and conveyance of the marshal*l* thereunder, divested the plaintiff of his right, title, and interest in and to the premises in the declaration mentioned for & during the natural life of the said plaintiff, & that as to said estate for and during the natural life of the plaintiff in said premises the jury must find for the defendant."

The court refused to grant said instruction, but instructed the jury that the sentence of condemnation was void, and that the plaintiff was not divested of any part of his title in the premises by reason of said sentence and the said sale and deed of the marshal*l*, because the answer, claim, and appearance of the , Wm. N. McVeigh, was struck from the files by said court before said decree and sentence was entered, and the said McVeigh was thus denied a hearing and his prop-
50 erty condemned without any opportunity of defence on his part.

To the ruling of the court refusing the instruction prayed, as well as to its ruling in granting the instruction, the defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be signed, sealed, enrolled, & made part of the record, which is done accordingly.

ENOCH M. LOWE, [SEAL.]
Judge of the Corporation Court of the City of Alexandria.

The following bond was filed by the defendant, to wit:

51 *Suspending bond.*

Know all men by these presents that we, Ann Gregory, John S. Fowler, and Samuel N. Garwood, are held and firmly bound unto William N. McVeigh in the just and full sum of five hundred dollars, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, &c., jointly and severally, firmly by these presents, sealed with our seals and dated this 31st day of July, 1874.

The condition of the above obligation is such that whereas Ann

Gregory desires to prefer to the judges of the supreme court of appeals for Virginia a petition for a writ of supersedeas to a judgment of the corporation court of Alexandria, rendered on the 21st day of July, 1874, in an action of ejectment, wherein William N. McVeigh is plaintiff and the said Ann Gregory defendant, whereby it was considered that the plaintiff recover against the defendant his fee-simple to the premises in the declaration mentioned, and $1,532 damages,
52 with interest thereon from the 21st day of July, 1874, till paid, and costs; and whereas execution was ordered by said court to be stayed for 60 days, upon the defendant giving bond within 10 days in the sum of $500:

Now, if the said Ann Gregory, her executors or administrators, shall well and truly pay the amount of all such costs and damages as shall be awarded by reason of the stay or suspension aforesaid, then the above obligation is to be void; otherwise it is to remain in full force. John S. Fowler, one of the sureties in this bond, waives his homestead as to this obligation.

ANN GREGORY. [SEAL.]
JOHN S. FOWLER. [SEAL.]
S. N. GARWOOD. [SEAL.]

Petition to Va. court of appeals.

To the hon. the supreme court of appeals of Virginia:

The petition of Ann Gregory, of Alexandria, Va., respectfully represents that she is aggrieved by a judgment of the corporation court of Alexandria, rendered on the 21st day of July, 1874, in an action
53 of ejectment, wherein Wm. N. McVeigh was plaintiff and petitioner was defendant. A transcript of the record of said judgment is herewith presented. Your petitioner, in defending said action, relied upon a title to the property acquired under a sentence of the U. S. district court for the eastern district of Virginia, proof of which was duly made on the trial, but the court instructed the jury that said sentence was void. Petitioner assigns this ruling for error, and prays a writ of error & supersedeas may be awarded.

THE PETITIONER,
By S. FERGUSON BEACH,
Her Counsel.

ALEX'A, VA., *Aug. 18th*, 1874.

I certify that, in my opinion, there is error in the judgment referred to in the above petition, for which it should be reversed.

S. FERGUSON BEACH,
An Atty. Practicing in Court of Appeals of Virginia.

Order of Va. court of appeals.

We, the undersigned, judges of the supreme court of appeals
54 of the State of Virginia, deem the judgment complained of in the foregoing petition plainly right, for reasons set forth in the opinion delivered by this court in the case of Underwood v. McVeigh, 23 Gratton, pp. 409, 443, and we therefore reject the said petition and refuse to award a writ of error & supersedeas to the said judgment,

according to the prayer of the said petition; and we direct that this order be entered of record in the corporation court of Alexandria.

Given under our hands at Staunton, in the said State, this 12th day of September, 1874.

R. C. S. MONCURE.
JOS. CHRISTIAN.
FRANCIS ANDERSON.
WALLER R. STAPLES.
WOOD BOULDIN.

To the clerk of the corporation court of the city of Alexandria.

VIRGINIA, ALEXANDRIA CORPORATION COURT,
Clerk's Office, Sept'r 15th, 1874.

The foregoing petition and order was received and entered of record. Test.

MORTON MARYE, *Clk.*

55 *Attestation.*

VIRGINIA,
City of Alexandria, to wit:

I, Morton Marye, clerk of the corporation court of the city of Alexandria, Virginia, hereby certify that the foregoing contains a true and perfect transcript of the record & proceedings in a cause determined in said court, wherein William N. McVeigh was plaintiff and Ann Gregory was defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at said city of Alexandria, this 12th day of October, 1874.

[SEAL.] MORTON MARYE, *Clerk.*

56 To the Hon. William Strong, associate justice of the Supreme Court of the United States:

The petition of Ann Gregory, of the city of Alexandria, Va., showeth as follows:

On the 21st day of July, 1874, at a session of the corporation court of Alexandria, Virginia, in an action of ejectment therein pending, wherein Wm. N. McVeigh was plaintiff & your petitioner was defendant, judgment was rendered against your petitioner for a house and lot in said city, (which was the subject-matter of controversy in said suit,) and for damages for mesne profits. Your petitioner, in defence to said action, relied upon a deed from the marshal of the U. S. for the eastern district of Virginia, made pursuant to a decree of the district court of the United States for said district, entered in a suit in confiscation under the act of Congress approved July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, & for other purposes," by which decree the life-estate of the said McVeigh in said property was condemned as
57 forfeited to the United States, and was ordered to be sold and conveyed by said marshal. The decision of said court was adverse to the right & title so claimed; all of which appears by the record, a transcript of which is herewith exhibited.

Your petitioner subsequently applied to the judges of the supreme court of appeals of Virginia for a writ of error and supersedeas to said

judgment to carry up said judgment to that court for review; but such application was refused by all the judges of said last-named court, so that the judgment of the corporation court of Alexandria is a final judgment of the highest court of the State of Virginia in which a decision of said suit could be had, as also appears by said record. Your petitioner therefore prays your honor to allow a writ of error to the said corporation court of Alexandria, Virginia, being the highest court of law or equity of the State of Virginia in which a decision in the suit could be had, to bring up said record to the Supreme Court of the United States for review and for the correction of the errors apparent therein,
58 according to the form and effect of the statute in such case made and provided.

Respf'ly, ANN GREGORY,
By S. FERGUSON BEACH, *her Atty.*

ALEXANDRIA, VA., *Sept.* 15, 1874.

59 (Indorsed:) Ann Gregory v. Wm. N. McVeigh. Petition. 1874, Sep. 15th. Filed.
Sep. 15, 1874. Writ of error allowed.

W. STRONG,
Asso. Jus. Sup. C. U. S.

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the [SEAL.] corporation court of the city of Alexandria, State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said corporation court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William N. McVeigh, plaintiff, and Ann Gregory, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in
61 favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Ann Gregory, as by her complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

Issued 15 Sept., 1874.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by W. Strong, asso. jus. S. C. U. S.

(Indorsed:) Gregory v. McVeigh. Supersedeas. 1874, Sep. 15, filed. To be returned with record.

62 The United States of America to William N. McVeigh, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the corporation court of Alexandria County, State of Virginia, wherein Ann Gregory is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, associate justice of the Supreme Court of the United States, this fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

W. STRONG,
Ass. Jus. S. C. U. S.

63 SEPT. 18, 1874.—Service acknowledged.

C. W. WATTLES,
Counsel for Deft. in Error.

64 Know all men by these presents that we, Ann Gregory, of the city of Alexandria, Va., and I. A. Roman, of Washington, D. C., Hamilton I. Gregory, of Washington, D. C., are held and firmly bound unto Wm. N. McVeigh in the just and full sum of twenty-five hundred dollars, to be paid to the said McVeigh, his personal representatives or assigns, to the payment whereof well and truly to be made we bind ourselves jointly and severally, firmly by these presents. Sealed with our seals, and dated this 15th day of September, 1874.

The condition of the above obligation is such that whereas lately, at a corporation court for the city of Alexandria, Virginia, in a suit therein depending between said McVeigh, plaintiff, & said Ann Gregory, defendant, judgment was rendered against the said Ann Gregory, and she has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, & a citation directed to the said McVeigh, citing and admonishing to appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next: Now, if the said Ann
65 Gregory shall prosecute said writ of error to effect and answer all

damages and costs if she fail to make her plea good, then the above obligation to be void, else to remain in full force and virtue.

Approved.

ANN GREGORY. [SEAL.]
I. A. ROMAN. [SEAL.]
HAMILTON J. GREGORY. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN S, FOWLER as to the signature of Ann Gregory.
CHAS. CONS. CALLAN as to I. A. Roman and H. I. Gregory.

DISTRICT OF COLUMBIA,
City of Washington, to wit:

Before me, Chas. Cons. Callan, a notary public in and for the said city, personally appeared I. A. Roman and Hamilton J. Gregory, parties to the above bond, and make oath in due form of law that they are worth the sum of twenty-five hundred dollars over and above their just debts.

Given under my hand and seal of office this 17th day of September, 1874.

[SEAL.] CHAS. CONS. CALLAN,
Notary Public.

66 A copy.
Test:

MORTON MARYE, *Clk.*

(Indorsement on cover:) No. 633. Ann Gregory, plaintiff in error vs. William N. McVeigh. Virginia, corporation court Alexandria City. Filed 16th October, 1874.

Supreme Court of the United States.

No. 118.

RICHARD WINDSOR, PLAINTIFF IN ERROR,

vs.

WM. N. McVEIGH.

BRIEF FOR PLAINTIFF IN ERROR.

S. FERGUSON BEACH,
For Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 118.

RICHARD WINDSOR, PLAINTIFF IN ERROR,

vs.

WM. N. McVEIGH.

BRIEF OF MR. S. F. BEACH, FOR PLAINTIFF IN ERROR.

This was an action of ejectment, brought by Wm. N. McVeigh against Richard Windsor, to recover a house and lot, in the city of Alexandria, Virginia.

The plaintiff having offered evidence to establish his title, the defendant, to maintain the issue on his part, offered in evidence the record of a sentence and decree of condemnation of the United States district court for the eastern district of Virginia, by which the property in controversy was condemned as forfeited to the United States, under the general confiscation act of July 17, 1862.

He proved the sale and conveyance of the marshal under said sentence, and other conveyances transmitting the confiscation title to himself.

Thereupon the defendant moved the Court to instruct the jury that the sentence and decree of condemnation, and the sale and conveyance of the marshal thereunder, divested the plaintiff of his right, title and interest in and to the premises, for and during the natural life of the plaintiff, and that as to said life estate the jury must find for the defendant.

This instruction the Court denied: and added, that the sentence of condemnation was void, and that the plaintiff was not divested of any part of his title to the premises thereby, because the answer, claim and appearance, of said McVeigh were struck from the files by the said district court before the sentence was rendered, and the said McVeigh was thus denied a hearing, and his property was condemned without any opportunity of defense on his part.

On these rulings of the Court judgment was rendered for the plaintiff in the ejectment, and the defendant has brought his writ of error to have these rulings reviewed.

Was the confiscation a nullity? That is the chief question in the case.

That the decree was erroneous may be admitted, without prejudice to the position of the plaintiff in error. If the Court had jurisdiction to render the decree, a sale and conveyance under it carried a good title to the purchaser, though, as between the parties to the decree, it might have been reversible for error. So long as it stood, in fact, unreversed, it was a valid foundation of title, and a reversal, even, if subsequent to the purchase, would not impair the title.

Was the sentence of condemnation rendered by a court of competent jurisdiction for that purpose?

The record of this confiscation in every particular except one, from the district attorney's order of seizure to the marshal's deed, is substantially identical with the record in Tyler *vs.* Defrees, (11 Wallace, 331,) in which this Court sustained the confiscation.

The excepted particular is the one for which the Court below held the confiscation void, and it is as follows:

Process of monition having been issued and executed warning all persons interested or claiming an interest in the property seized to file their claims and answers on a day named, Mr. McVeigh, by counsel, filed a claim and answer, whereupon the district attorney filed a motion, as follows:

"It appearing from the answer that has been filed in this "cause that the said respondent, Wm. N. McVeigh, is and "at the time of the filing same was, a resident of the city "of Richmond, within the Confederate lines, and a rebel, "L. H. Chandler, attorney for the United States, moves "that the said claim and answer, and the appearance of "Messrs. Beach and Bradley, interposed in behalf of the "said William N. McVeigh, be stricken from the files."

Subsequently, this motion being heard, the following order was entered:

"And now came on to be heard the motion of L. H. "Chandler, attorney for the United States, libellants herein, "to strike from the files the answer, claim and appearance "interposed by Messrs. Beach and Bradley for and in behalf "of respondent, William N. McVeigh, and on motion of "L. H. Chandler, the application of libellants is granted, "and it is ordered that the answer and claim interposed in "this suit by said Messrs. Beach and Bradley, has been "*irregular* and improperly admitted on file in this cause, and "that the same be stricken therefrom."

The court then entered sentence of condemnation and sale, in the usual form.

The precedent for the order striking respondent's answer from the files was a like order in a like case, previously made by the district court of the United States for the southern district of New York, published in the principal newspapers of that day, (The United States *vs.* 1,756 shares of capital stock, LeRoy M. Wiley, claimant,) which order, though itself afterwards reversed, (see 5 Blatchford, 232,) was a conspicuous precedent, and one regarded as of high authority when the order was made in this case of the United States *vs.* McVeigh.

This order, striking the claim and answer from the files, it is maintained, absolutely avoided the subsequent

sentence of condemnation, so that no valid title could be founded upon that sentence.

Did the order have that effect?

The cause being a cause *in rem*, the jurisdiction of the court over the cause attached and became complete by the seizure of the property. The final purpose for which its jurisdiction was invoked was to decide whether the property seized was or was not liable to be condemned as forfeited to the United States. Having acquired, by the seizure, full jurisdiction to decide that question, it had, by consequence, full jurisdiction to decide all questions incidentally arising in the progress of the cause, and the validity of its final decree could not be questioned collaterally, because of its rulings, even though erroneous, on any of the questions so incidentally arising.

"Where a court has jurisdiction, it has a right to decide "every question which occurs in the cause; and whether "its decision be correct or otherwise, its judgment, until "reversed, is regarded as binding in every other court. "But if it act without authority, its judgments and orders "are regarded as nullities. They are not voidable, but "simply void, and form no bar to a recovery sought even "prior to a reversal in opposition to them."

Elliott *vs.* Piersol, 1 Peters, 340.

"It is a doctrine of law too long established to require "citation of authorities, that where a court has jurisdiction "it has a right to decide every question which occurs in the "cause; and whether its decision be correct or otherwise, "its judgment till reversed is regarded as binding in every "court; and that where the jurisdiction of a court, and the "right of a plaintiff to prosecute his suit in it, have once "attached, that right cannot be averted or taken away by "proceedings in another court."

Peck *vs.* Jenniss, 7 How., 624.

These extracts state a familiar principle of law daily recognized in this Court.

McNitt *vs.* Turner, 16 Wallace, 366.
Cornett *vs.* Williams, 20 Wallace, 246.

In cases *in rem* it is a question frequently arising whether a person asking, has a right to be admitted and heard as a claimant, (The Mary Anne, Ware's Reports, 104,) but the validity of the final decree, as against collateral impeachment, has never been held to depend upon the ruling which the court might make on such a question.

The jurisdiction acquired by the seizure of the *res* does not become divested by the erroneous exclusion of a party asking to be admitted as a claimant. The jurisdiction is not at all dependent upon the admission or exclusion of a claimant. The admission of a claimant does not strengthen, his exclusion does not impair, the jurisdiction. Having once attached by the seizure, it continues unaffected by either alternative, so that a title, acquired under its sentence, rests upon the judgment of a court of competent jurisdiction.

But it is said, that by the order striking his claim and answer from the files, Mr. McVeigh was condemned, as to his property, unheard, and the sentence of condemnation was therefore void.

No one of course, disputes the proposition that "a judgment rendered against a man unheard" is absolutely void. Authorities abound which declare the principle to be fundamental and universal, and the principle is admitted here, as broadly as it can be found anywhere stated or applied.

But does the present case fall within the operation of this principle? Manifestly not.

A judgment is rendered against "a party unheard," in the sense which makes it void, only when it is rendered without notice to him of the pendency of the proceedings, and without *opportunity* to him of making defence.

Examine every reported case in which this principle is

applied, and it will be found that they are cases in which either *no process at all was ever issued*, or *no process was ever actually or constructively served*. No case can be found where the principle has been applied, which was not a case involving one or the other of these conditions.

But in proceedings *in rem*, where the *res* has been seized, neither of these conditions *can* exist, because the seizure of the property is service of process upon everybody.

Moreover, in this particular cause, besides the seizure of the *res*, process of monition was duly issued. This process was duly executed by publication, and an appearance was actually put in by the claimant in response to this process. Here, then, is the very opposite of those cases where judgments are held nullities because rendered against a party unheard. In place of no process, or no service of process, we find (besides the seizure of the *res*) process issued, process executed, and the appearance of the claimant in response to the process.

Whenever a party is before a court, in response to its process, seeking to make a defence, and the court wrongfully refuses to entertain his defence, he is condemned unheard, in such a sense as to make the judgment *voidable between the parties to the judgment*. But if he take no steps to have it avoided, and suffer it to stand as rendered, he cannot impeach the title of *a third person* founded upon the judgment, because it might have been avoided.

A man is sued, in debt, in a court which has jurisdiction of the action; process is served upon him; he appears, and files an answer to the complainant.

The court, on some erroneous view of his answer, strikes it from the files and enters up judgment against him for the debt. Could it be said, in such case, that the opportunity of making defence was denied to or taken away from the defendant by the action of the court in excluding his answer? Manifestly, his defence and the opportunity of making it would be fully preserved to him, and preserved

to him unimpaired, notwithstanding the erroneous exclusion of his answer.

The only effect of the exclusion would be to necessitate proceedings in error—proceedings by which his defence would be made to avail him as effectively as if it had been originally allowed him in the tribunal below.

The exclusion of the answer would not take away or impair the *opportunity* or the means of defence; it would change only the *method* of making the defence, and would not therefore render the judgment subsequently entered, a "judgment against a party unheard."

In the case supposed, suppose further, that the judgment having been rendered, and no proceedings in error having been taken, the defendant's property is sold under the judgment, for the satisfaction of the judgment, could the title of the purchaser be successfully assailed on the ground that the judgment was one rendered against the defendant without a hearing, and therefore a nullity? Does an error committed by a court in the progress of a cause, *ipso facto*, render all subsequent proceedings in the cause absolutely null and void? No one will answer this latter question in the affirmative; and unless it is so answered, the former question must be answered in the negative.

Yet in no particular does the case supposed differ from the actual case under consideration. In the latter, we have a case over which the court had jurisdiction; in which the claimant appeared and filed his answer; in which the court erroneously struck out the answer and rendered sentence of condemnation; and in which, there being no proceedings in error, the property condemned was sold under the sentence.

It is, therefore submitted that the order of the United States district court striking the answer of the claimant from the files did not render its subsequent sentence of condemnation absolutely void—it rendered it voidable, only, for error—and until actually avoided by proceedings in error,

it was a valid judgment of a court of competent jurisdiction, and, as such, a firm and solid basis of title.

The sentence of condemnation, in this case, having been rendered by a court of competent jurisdiction and never having been reversed or reviewed, the title claimed under it, by the plaintiff in error should have been sustained by the court below.

ALEXANDRIA, VIRGINIA, *November* 14, 1876.

S. FERGUSON BEACH,
For Plaintiff in Error.

Supreme Court, United States.

RICHARD WINDSOR
vs.
W. N. McVEIGH. } No. 118.

ANNE GREGORY
vs.
W. N. McVEIGH. } No. 163.

Brief of P. PHILLIPS,

for Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court, United States.

RICHARD WINDSOR
vs.
W. N. McVEIGH. } No. 118.

ANNE GREGORY
vs.
W. N. McVEIGH. } No. 163.

Brief of P. PHILLIPS,

for Defendant in Error.

Statement of Windsor's Case.

McVeigh brought his action of ejectment in the Corporation Court of Alexandria, to recover the premises therein described, against one Ball, the tenant in possession.

Richard Windsor, on his motion, was permitted to be substituted as defendant landlord.

Issue was joined, on the plea of not guilty, and a verdict and judgment were rendered for the plaintiff.

Thereupon the defendant took the case to the Supreme Court of Appeals, where the judgment was affirmed on 30 June, 1874, for the "reasons set forth in the case of Underwood v. McVeigh, 23 Grattan, pp. 409, 418."

On the trial of the case in the Corporation Court, the

defendant offered in evidence the proceedings in the confiscation case against McVeigh, had, on a libel filed 25 August, 1863.

This record shows that on 10 March, 1864, on motion of the Attorney of the United States, the court ordered that the claim and answer of McVeigh, and the appearance of Messrs. Beach & Bradley, interposed in behalf of McVeigh, be stricken from the files. pp. 10, 11.

And on the same day the court directed the premises to be sold at public auction for cash to the highest bidder.

The sale was made, and the deed was executed to one Murphy, on 11 April, 1864, which recites the confiscation proceedings as the authority for the sale.

On the 31 July, 1865, Murphy conveyed these premises to Windsor, the present plaintiff in error.

On this evidence, the defendant Windsor asked the instruction, that the title of the plaintiff, McVeigh, was divested for and during his natural life, and that the same was vested in the defendant.

But the Court refused this, and instructed the jury that the decree and sale were void, "because the answer, claim and appearance of McVeigh, were struck from the files by the court, before the decree and sentence were entered, and he was thus denied a hearing, and his property condemned without any opportunity of defence on his part." p. 16.

Exception was taken to this ruling, and its correctness present the sole question on the writ of error, brought to reverse the judgment of the Supreme Court of Appeals.

Statement of Gregory's Case.

This was also an action of ejectment brought by McVeigh against Anne Gregory to recover the premises therein described.

On the issue of not guilty, there was a verdict and judgment for the plaintiff.

The defendant then petitioned the Court of Appeals for a writ of error and supersedeas, which were denied by the judges of that court.

Thereupon she sued out this writ of error to the Corporation Court of Alexandria, in which the verdict and judgment were rendered.

On the trial the defendant introduced the confiscation proceedings used in evidence in Windsor's case, and also a deed of the Marshal to Charles N. Gregory for the premises sold under the decree of condemnation. The deed to said Charles is dated 11 April, 1864.

The same charge was asked and refused, as found in Windsor's case, and the question on the exception is the same in both cases.

The Confiscation Acts.

For the purpose of bringing the late civil war to a conclusion, Congress passed two Confiscation Acts.

The first is the Act 6 August, 1861, (12 Stats. 319) by which *property used* with the consent of the owner, is made subject to "Prize and Capture, wherever found." It is made the duty of the President to cause the same to be seized, confiscated and condemned—such prize and capture to be condemned in the District or Circuit Courts, or in admiralty, in any district in which the same may be seized.

This was followed by the Act of July 16, 1862. (12 Stats. 589.)

The 5th Sec. provides for the seizure of the property of persons designated in six specified classes.

The 7th Sec. provides that, to secure the condemnation of *such* property, proceedings in *rem* shall be instituted, which proceedings shall conform as nearly as may be to proceedings in Admiralty or Revenue cases. "And if said property, whether real or personal, *shall be found to have belonged to a person engaged in the Rebellion*, the same shall be condemned, &c."

These two acts differ in this. In the first, the property seized is the offending thing; in the last, the property alone of persons in certain classes is subject to condemnation, and this only when *it is so found*—that is, when the property is judicially ascertained to belong to one included in the designated classes.

McVeigh was directed by publication to appear and answer to the libel. He did so. His appearance, claim and answer were stricken out, on the ground that he was a *rebel* and had no right to be heard, and a decree *pro confesso* was entered against him on the same day.

On this the question arises, is such a decree erroneous merely, or is it absolutely void?

That a judgment or decree under these circumstances is absoluely null, would seem to be beyond controversy.

Hollingsworth vs. Barbour, 14 Pet. 475.

The reason of this (say the Court) is founded "in the immutable principles of justice, that no man's rights should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right."

See also, 1 Smith's Lead. Cases,
Cress vs. Durden, 818.

The contention of the other side is, that these confiscation proceedings are strictly proceedings *in rem*, and when the court seizes the thing the jurisdiction is estab-

lished, and the refusal to hear the defendant in his defence is error merely, which cannot affect the title of a purchaser under the decree.

What has been the construction placed by this court on the above acts?

In Union Ins. Co. vs. U. S., 6 Wall., 765, there was a seizure of offending property under the act of 1861, the court say:

"Such proceedings do not necessarily constitute a cause in admiralty when instituted for the condemnation of property on land; they have relation exclusively to matters which, in their nature, *are not of admiralty jurisdiction.*"

Again, this construction impairs no rights of parties. In cases of seizure on land, the right of *trial by jury* is not infringed.

In Armstrong vs. U. S., 6 Wall., 766, also under the act of 1861, the court say: "The proceedings related to a seizure on land, and though conducted under the statute in the forms of admiralty, must be regarded as a case *of common law jurisdiction*—a final decision in which can be reviewed here only on *writ of error.*"

In Morris Cotton, 8 Wall., 511, held on a libel filed under these acts, that the "District Court *had no jurisdiction* of the case in admiralty *to render any decree on the merits*; for where a seizure is made on land, the suit, though in form a libel or information, is an *action at common law*, and the claimants are entitled to trial by jury."

In Miller vs. U. S., 11 Wall., these authorities are recognized, while the court decide that a condemnation may be had when the defendant has failed to appear and answer.

Again, in the Confiscation Cases, 20 Wall., 110, the court say: "No doubt in cases of seizure upon land resort should be had to the common law side of the court, and such, in substance, was, we think, the case here. Everything necessary to a common law proceeding *in rem* is found in the record. An information was filed, a citation and limitation issued, a default taken, and in consideration of the evidence, condemnation was adjudged."

In reference to the jurisdiction of the court, it is said: "Undoubtedly, though not an inferior court, the District Court is one of limited jurisdiction. and that it has jurisdiction of the particular case which it attempts to adjudicate must always appear."

We have two cases arising under these acts, where the contest was directly with a purchaser under the decree of condemnation, and where the same argument now urged, was passed upon by the Court.

Thus, in Bigelow vs. Forest, 9 Wall., 351, it was maintained on behalf of the purchaser, that as the property had been duly seized under the act, and the proceedings had in conformity thereto, the decree could not be collaterally assailed by showing that the District Court did not have jurisdiction.

As to this, the court answered: Doubtless, the decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally, but under the act of Congress the District Court had no power to order a sale which would confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have *transcended its jurisdiction*."

In Day vs. Micon, 18 Wall., 160, there was a like contest, and the doctrine in Forrest's case was held to be decisive on the question of jurisdiction.

So in the case of Lasere vs. Rocherau, 17 Wall., 438, this principle was applied to the judgment of a State Court. During the enforced absence of Lasere, his property was condemned and sold to Rocherau under executory process. After the termination of the war, he instituted proceedings to annul the judgment and sale. The Supreme Court of the State maintained the sale, and this court reversed the judgment, on the ground that it "was contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard."

In delivering this opinion, the court cites McVeigh vs. U. S., 11 Wall., 267, in which the proceedings now relied on were directly passed on by the court.

Mr. Justice Swayne delivered the opinion in McVeigh's case, and referring to the order striking out the claim and answer, says: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot on our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The decision in Forrest vs. Bigelow, and Day vs. Micon, dispose of the argument, that the court having acquired jurisdiction, by virtue of the seizure of the *res*, its decree could, for no subsequent order, be collaterally assailed.

This citation of decisions are so conclusive that further argument is unnecessary.

But independent of authority the same conclusion would be reached by a proper reading of the statute itself, which confers a special and limited jurisdiction in an entirely new class of cases.

The statute does not authorize the condemnation of property of all persons.

The power to condemn is restricted to that owned by persons described in the act itself, and can only be exercised after it is "found to have belonged to a person engaged in the rebellion."

The fact to be found when the defendant appears—is for the determination of a jury under proper instructions from the court. This right of trial by jury is secured to the citizen by constitutional guarantee, and the action of the court which deprives the party not only of a trial by jury, but of the right of being heard at all, shows that the *necessary fact was not found*, and with it the want of authority to render the decree of condemnation.

In the letters of Phocion, it is said: "The government may indeed enact laws, and annex to the breach of them the penalty of forfeiture; but before that penalty can operate, the existence of the fact, upon which it is to take place must be ascertained in the mode which the fundamental law has provided. If the trial by jury is the mode known and established, the persons who administer the government, in deviating from that course would be guilty of *usurpation*."

Hamilton's Works, 2 Vol., 321.

The constitutionality of these acts has been heretofore seriously assailed on the ground that they permitted confiscation before the parties were duly convicted in a criminal proceeding. Their validity has been only maintained under the war power, three of the justices dissenting.

It is sufficient for us to say, that in the exercise of this war power, Congress has imposed certain limitations on the power of the court, and it is on these limitations we rely.

The act provides, that the proceedings in such cases should conform "as nearly as may be, to proceedings in admiralty or revenue cases."

Was it necessary in such cases to give notice to those in interest?

There is but one answer to this, and its necessity was clearly recognized by the judge who entered this decree.

He issued his mandate to the marshal, commanding him to give public notice by advertisement for fourteen days before the day of trial, calling on all persons having any interest in the property libelled to appear on the day named for the trial, and make their allegation in that behalf.

This mandate was obeyed, and the marshal made his return, that he had duly warned all persons, to appear and show cause why condemnation should not be decreed by intervening for their interests.

When McVeigh, the only person interested, did appear, he was refused a hearing. This was a judicial farce played before high Heaven! The judge the principal actor. The denouement is in the closing scene, where he pronounces his decree declaring that the *usual proclamation had been made and the default of all persons duly entered.*

Reliance is placed on the ground that these proceedings are to be tested by the principles which apply to those technically *in rem*, and that as the court ac-

quired jurisdiction by the seizure of the *res*—its action in the matter complained of is to be treated as error merely.

Proceedings in *rem* do not differ from other judicial proceedings in the essential principles of justice which underlie all.

Tho mode of notifying parties—arising out of the necessities of the case, and the character of the property, regarded as the offending thing, differs from those at common law. The seizure and the monition are the substitutes for personal service. But in the one as well as in the other, the case proceeds upon the theory, that the party in interest has been notified, and that he will be thus afforded an opportunity of being heard before condemnation.

It may be that the party in truth is not aware of the notice. This may also take place in the case of absent defendants in trials at common law, where by statutory provision publication is made. A decree or judgment when there has been such notice would not be void, because of the ignorance of the party of the pendency of the suit.

But, we may safely challenge the production of a case either at common law, in Chancery, or in admiralty, where a party having the interest in the litigation offering to appear has been denied the right to assert his interest, in which the jurisdiction of the Court has been upheld.

The action of the judge in this case, is not based on any informality of the answer or on any other defect or irregularity under the provisions of the law or the rules of the court.

It is placed by him on the ground that the respondent

resided in the City of Richmond and was a *rebel*, and therefore his answer should be stricken from the files.

In other words, the judge declared that McVeigh was not a party to this litigation, that he was not included in the notice calling upon all persons in interest to appear and assert their claim, and that he had no right to be heard.

It is this assumption, which Swayne, Justice, denounced in indignant terms as "contrary to the first principles of the social compact."

Mr. Beach, while admitting that it is a universal principle that a judgment against a man unheard is absolutely void, insists that McVeigh does not occupy this position, because, says he, McVeigh had notice by the seizure of the *res* as well as by publication.

He regards the notice to be the hearing.

When there has been no notice, he admits the judgment would be void; but when the fact of notice is established, he says the nullity of the judgment cannot be asserted, though as in the present case the court refused to recognize the defendant as having a *locus standi in judicio*.

This is his own language.

"A judgment is rendered against a party unheard, in the sense which makes it void only when it is rendered without *notice to him*, and without *opportunity to him of making defence*. It cannot be true of a party who is before the court in response to its process, and against whom judgment is rendered, that the judgment is rendered against him *unheard* within the meaning of the principle under consideration."

This may be an ingenuous view of the case, but it is evidently unsound. The notice is but a means to an end. And to hold the nullity of a judgment where there is an

absence of notice, and to assert its validity where the party is refused a hearing, is to substitute the shadow for the substance.

It is said further that McVeigh was not deprived of the opportunity or means of defence, by the action of the judge. That it only changed the *method* of making his defence—the only effect being to necessitate *proceedings in error.*

McVeigh's right to make a defence, that is, the right to show that he was not engaged in the rebellion, and was not included in the descriptive terms of the statute, was a right to make it in the court in which the libel was filed. It is no answer to say, that he was not unheard, because he could have had his writ of error to another tribunal, in which this right could have been asserted.

Again, if the argument is sound, it is wholly unnecessary to maintain that this proceeding is strictly *in rem*—for it would equally apply to all judicial proceedings as well as to those in admiralty.

It was at first much doubted, whether under these acts the judgment of the lower Court could be reviewed either by writ of error or appeal, as they make no provision for revision.

There are many cases, in which, owing to the amount in controversy or the nature of the case no review of the judgment is permitted by law.

Where, then, would be the remedy; where the "opportunity of making defence."

Further, to stay execution on a judgment, the writ of error must be accompanied with a sufficient bond to operate as a supersedeas. Again, we ask where would be the "opportunity of making defense, if the party

was unable to give the security required by law" to arrest execution?"

As we have said, the principle announced by Mr. Beach, if sound, is equally applicable to the judgments and decrees of all courts; that it is not sound, is shown by the above conditions, in which the defendant would not possess the *right* or the *means* of being heard in the Appellate Court.

In conclusion, we insist—

First. That proceedings under the confiscation acts are not technically in *rem*, but partake of the nature of common law actions in which the party is entitled to the right of trial by jury, and in which the judgment is reviewed by writ of error.

Second. That even if they were to be considered as strictly proceedings in *rem*, the action of the judge on the mere motion of the District Attorney in striking out the appearance and answer of defendant on the mere *dictum* that he was a rebel, and had no right to be heard, was a "violation of the first principles of the social compact, and of the right administration of justice," and as such the judgment is a nullity.

P. PHILLIPS,
For Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

RICHARD WINDSOR
vs
W. N. McVEIGH. } *No. 583.*

ANNE GREGORY
vs.
W. N. McVEIGH. } *No. 633.*

FOREP, Trustee for Mrs. M. J. Underwood,
vs
W. N. McVEIGH. } *Second writ ——*
Granted April 2, 1875.

BRIEF OF JOHN HOWARD FOR DEFENDANT IN ERROR ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

AUDI ET ALTERAM PARTEM.

The decree of confiscation was void:

1. Because the Court never acquired jurisdiction of the *res*.

There was no judicial order of seizure. pp. 7, 8. In this the case is distinguishable from Miller *vs.* U. S., 11 Wall., 268, and from Tyler *vs.* Depees, 11 Wall., 331.

2. Because if the Court ever acquired jurisdiction of the *res*, the jurisdiction was to hear and decide the cause *inter partes* in due course of law, according to the nature and organization of the Court, which required the hearing of the defendant before the condemnation of the property; and the dismissal of the defendant from Court, and then proceeding to condemn the property, was not a judicial act, not a judicial determination of any issues of law or fact, not an adjudication *inter partes*, but simply an *outlawry* of the defendant, and then a forfeiture of his land.

The United States acquired no title as against the absent owner, and could convey none.

Proceedings in rem constitute no exception to the universal rule that no man can be condemned in his property or estate without notice and an opportunity first to be heard.

"The court acquires jurisdiction by seizing the vessel or other thing to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court, which had jurisdiction of the property, *will have none* to render judgment."—Cooley's Const. Limitations, ed. 1874, p. 402, Marg. p. 403. Blackwell on Tax Titles, ed. 1869, p. 211–12, Marg. p. 214; and cases cited *e. g.* Chase *vs.* Hathaway; 14 Mass., 222; Smith *vs.* Burlingame; 4 Mason, 121; Blackwell on Tax Titles, p. 183–4, Marg. p. 184–185; and see Ray *vs.* Norseworthy, 23 Wall. 128–136; Earle & Co. *vs.* McVeigh, 1 Otto. 503–507, where it is said, "Notice to the defendant, actual or constructive, is an *essential requisite of jurisdiction*;" and why notice if the defendant is not to be heard after he is notified? And again, p. 510: "Even in proceedings *in rem* notice is requisite in order that the sentence may have any validity," and see Taylor *vs.* Carryll, 20 How., 599; Muller *vs.* Ehlers, 1 Otto, 251. 23 Wall. 465.

3. Because the so-called sentence and decree of condemnation was fraudulent upon the face of the proceedings. The defendant was defaulted for non-appearance when he had appeared, and then his property was forfeited for his non-appearance when he had been forbidden to appear.—Bouvier, tit. Default.

Can appearance but not real or capture in the
of defendant's property or plaintiff's Court
2 How. 338; 18 How. 503, 2 Wall. 213,
this latter being reversed by the latter & there be
no adversary parties.

SUPREME COURT OF THE UNITED STATES.

RICHARD WINDSOR
vs.
W. N. McVEIGH. } No. 583.

ANNE GREGORY
vs.
W. N. McVEIGH. } No. 633.

BRIEF OF JOHN HOWARD, FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

These cases are alike in all respects. So far as confiscation proceedings are concerned they are *fac similes* of United States vs. McVeigh, 11 Wall., 259, being among the twenty-odd cases, of which that is a type, in which valuable property of the unfortunate defendant in error was confiscated and sold without a hearing, his appearance answer, and claim having been summarily striken from the files, and his property then appropriated by the officers of the Government in a manner suitable to themselves. He is an old man, and has now been engaged for ten years in heart-sickening litigation to recover his property, of which he was so illegally deprived; and under the adjudications of this Honorable Court, and the decisions of the State courts in conformity therewith, a part has been restored to him. The remainder is involved in litigation, presenting the main question which arises in these two cases; and it is therefore respectfully and most earnestly hoped that these cases will be decided upon the merits, and thus become precedents, and not go off, as did Underwood vs. McVeigh (October term, 1873, No. 504) upon the technical point that the writ of error was directed to the wrong court.

It is not the province of courts to have mercy; if it were, here would be an occasion calling loudly for its exercise; but it is a case calling for speedy justice, as the *life* estate of the defendant in error is expiring every day, and in the course of nature he must enjoy his property soon, or not at all.

STATEMENT OF THE WINDSOR CASE.

This was ejectment brought by Mr. McVeigh in the corporation court of Alexandria, Virginia, to recover from Windsor a lot of land in that city, proved and acknowledged to be the property of McVeigh, unless his title had been divested by the confiscation proceedings, only under which Windsor held and claimed. Windsor gave in evidence the record of the sentence and decree of confiscation of the United States District Court of Virginia in the case of the United States vs. McVeigh, in 1864, involving this property, and the sale and deed made thereunder by the marshal to a party under whom Windsor claims by conveyance. The record disclosed that after the executive seizure of the property on the 22d July, 1863, a libel of information was filed under the confiscation act, in the said District Court, setting forth the grounds on which confiscation was claimed, and praying process of monition against the owner or owners; that such proceedings were had as that William N. McVeigh, to whom the property belonged, and whose right and title was sought to be confiscated, appeared by counsel, and filed his answer to the libel, and filed his claim to the property; that thereafter, namely, in March, 1864, on motion of the district attorney, this said appearance, answer and claim were stricken from the files, an entry made of the default of all persons, and then the property was condemned as forfeited to the United States, and ordered to be sold by the marshal, which was accordingly done.

Upon this evidence Windsor asked the court to instruct the jury that the proceedings in confiscation divested the life estate of Mr. McVeigh.

The court refused to grant instruction, but "instructed the jury that the sentence and condemnation was void, and that the plaintiff was not divested of any part of his title in the premises by reason of said sentence, and the said sale and deed of the marshal, because the answer, claim and appearance of the said Wm. N. McVeigh was struck from the files by the court before said decree and sentence was entered, and the said McVeigh was thus denied a hearing, and his property condemned without any opportunity for defence on his part." To the ruling of the court refusing the instruction prayed, as well as to its ruling in granting the instruction given, the defendant excepted. P. 16.

There was a verdict for the plaintiff, upon which judgment was entered. P. 3.

Thereupon the defendant prayed to the supreme court of appeals of Virginia for a writ of error and supersedeas; and on that application the judges in vacation made the following endorsement: "The writ of error and supersedeas prayed for in the foregoing petition are hereby refused for reasons set forth in the decision of this court in the case of Underwood vs. McVeigh, 23 Grat., pp. 409, 418, and at the request of the counsel for the petitioner, we certify this order to the clerk of the corporation court of Alexandria, in order that the same may be recorded." And the petition and order were accordingly received by the clerk of that court and recorded in vacation. P. 20.

Whereupon a petition for a writ of error was presented to one of the judges of this court, and the writ was awarded directed to the corporation court of Alexandria.

Upon this showing of the record, we contend:

I. That no Federal question was raised for adjudication, or was adjudicated by the State court, and thereupon no such question is presented for the decision of this court.

II. That, conceding that such a question was properly raised and was decided by the State court, the writ of error was directed to the wrong court, and must be dismissed.

The 25th section of the judiciary act provides, "that a final judgment or decree in any suit, in the highest court of law or equity in a State in which a decision in the suit could be had, *where is drawn in question* the validity *of a treaty or statute of, or an authority exercised under the United States*, and the decision is against their validity, * * * may be re-examined and reversed or affirmed in this court upon writ of error."

The validity of no treaty or statute is here involved, and therefore, in order to maintain the jurisdiction of the court, the plaintiff in error must claim by virtue of "an authority exercised under the United States," and show that the decision of the State court was against the validity of that authority. It is not sufficient for him to make a mere assertion of an exercise of authority under the United States as the foundation of his title. He must show that such authority was actually exercised, and exercised in a manner valid and binding upon the party, title to whose property he claims, according to the established and recognised principles of jurisprudence.

In Milligan vs. Harterpee, 6 Wall., 261–262, Chief Justice Chase, delivering the unanimous opinion of this court, said: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.

"In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a State court, that the right claimed did not exist."

So we say here. The right is claimed under an alleged judgment of the District Court of the United States for the Eastern district of Virginia; and if, on looking into the record, it appears that no such judgment existed or was in force it cannot be insisted that this court can review the decision of the State court that the right claimed did not exist. We contend that there was no judgment divesting the title of McVeigh and vesting it in the United States; that the so-called sentence and decree of condemnation and sale was an absolute nullity upon its face; not merely voidable, but wholly void; and that in this case it should be treated as if said alleged judgment had never been passed, even though it is attacked in a collateral proceeding.

The learned counsel for the plaintiff in error admits that if these premises are correct the conclusion drawn from them is inevitable. He admits that if the so-called decree of condemnation and sale be void this court has no jurisdiction in the case. But he contends that the decree was not void, but only voidable. Conceding that it was erroneous, he contends that the error could only be corrected by an appeal to the court of appellate jurisdiction.

The question is thus directly presented: Was the judgment or decree of confiscation and sale void or merely voidable? The question itself implies the exercise of judicial power in that proceeding; for wherever there is the judgment or decree of a court there must necessarily have been the exercise of judicial power or the functions of a court, in contradistinction to the exercise of mere arbitrary or usurped power.

And the inquiry thus arises, what is a judgment or decree of a court? What are its inherent and essential elements?

The question is answered in the horn-books of the law, and embodies principles involving the nature and structure of all courts of every kind, of judicature and the principles of all jurisprudence, human or divine.* There must be a complaint; there must be a party of whom the complaint is made; and both sides to the controversy must have a fair opportunity of being heard upon the subject of the contest, or, as it is styled in the Roman law, the *contestatio litis*. Thus Blackstone says: "In every court there must be at least three constituent parts—the *actor*, the *reus* and *judex;* the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact; and if injury appears to have been done to ascertain and by its officers to apply the remedy." And he adds that usually attorneys and counsel are allowed as assistants to the parties and the court. (Black. Com., Book III, p., marg., 25.

It thus appears that in every proceeding of a judicial nature there must be real parties to the contest, and that the parties respectively should be heard before the contest is decided. Else how could there ever be judicial judgment as to their respective rights and claims?

Judgment implies hearing of the contest. Hearing of the contest implies hearing of the parties contesting. If a party contesting is not allowed an opportunity to be heard, and to show the grounds of his contention, how is it possible, in the nature of things, that there could be any judicial determination as to his rights in the matter?

The very statement of the case exhibits the absolute solecism and absurdity of the supposition.

This court has from its origin, in times and ways unnumbered, affirmed the validity of these views. Thus, without citing any authority, the court said in *Lasere* vs. *Rochereau*, 17 Wall., 438: "It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard;" and in the still later case of *ex parte Robinson*, 19 Wall., 513,

*In King vs. Chancellor, &c., of the University of Cambridge (Dr. Bentley's case), 1 Str. 567, *Fortescue*, *J.*, said: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence on *Adam* before he was called upon to make his defence. *Adam* (says God), where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve."

the court say: "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

It was said above in respect to *Lasere* vs. *Rochereau* that no authority was cited by the court for its position. That was a mistake. There was cited a case of great consideration and importance, elaborately argued by eminent counsel, and in which a unanimous judgment of the court was delivered. It was the case of McVeigh vs. The United States, 11 Wall., 267; and the court there say: "That a different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt upon the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And in Galpin vs. Page, 18 Wall., pp. 368, 369, the court unanimously said: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is a judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In the light and under the authority of this long line of decisions, affirming perfectly elementary principles inherent in the very nature, and structure, and proceedings, the constitution, organization and functions of a court of justice, how can it be pretended, or gravely asserted, with any respect to the adjudications of this court, or to universally recognised principles of jurisprudence the world over, that the alleged judgment or decree of confiscation and sale was anything else than absolutely and absurdly void?

Conceding the previous proceedings in confiscation to have been regular and valid, so as to secure a judicial seizure of the property in question (*of which the record demonstrates the fact to have been the contrary*), when Mr. McVeigh appeared, by counsel, and filed his answer to the libel of information, and his claim to defend himself, and his property involved, his appearance, by counsel, his answer to the libel, and his claim to his property, presented his defence, and the defence of his property to the claim made by the United States in the said libel to take and appropriate it to its own uses.

His appearance, answer and claim were stricken out, and he was thus

denied all opportunity of making defence of himself or of his property, through himself, and, therefore, the idea that the edict of confiscation was a judicial decision upon issues joined, prosecuted and defended as a matter in litigation before a court of justice, cannot for a moment be entertained.

When the property of a citizen is taken from him, without an opportunity of being heard in his defence, and transferred to the Government, it may be a legislative act, it may be an executive act, it may be a despotic act, it may be a wicked and fraudulent act—but it is not a *judicial act.* In the appropriate language of this court, above cited: "It wants all the attributes of a judicial determination; it is a judicial usurpation and oppression, and never can be upheld where justice is justly administered." As a muniment of title, therefore, such an act is a mere *nullity.*

In speaking of such an act by the *legislature* of a State, Chief Justice Marshall, in delivering the opinion of the court, in Fletcher vs. Peck, 6 Cranch, 133, 136, said: "The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, *or it was exerting a mere power in which it was controlled only by its own will.*" After showing the principles upon which a court of justice ought to have acted in the matter, that great magistrate proceeded to say, in respect to the arbitrary power exercised by the legislature in transferring the property of citizens to the State: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; bnt the question whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection;" pp. 135–6. And the act was held to be void.

Among the extraordinary propositions contended for by the plaintiff in error it is not pretended that the person whose name is mentioned in these confiscation proceedings as *Judge* John C. Underwood was endowed with all or any of the powers of a *Legislature;* but if a legislature cannot arbitrarily transfer the property of an individual to the public, by what right can a man who happens to be sitting in a judicial position make it vacant by abdicating the office and functions of a judge *Judex inter partes*—"*exert a mere act of power in which he is controlled*

only by his own will," and proclaim an edict *sic volo, sic jubeo?* After having ignominiously dismissed the appearance, answer and claim of the defendant—after having thrust the defendant out of court, and thus ousted the court of all jurisdiction to try the issues made by the pleadings between the Government and the defendant—how was it possible for Mr. Underwood to exercise jurisdiction to pass upon those issues which he had arbitrarily set aside? Was there ever a greater legal absurdity? Was there ever so dark *"a blot upon our jurisprudence and civilization?"* And ought there not to be some signal punishment for a party who, trifling with the time and functions of this high court, in the face of its numerous decisions denouncing such acts as mere nullities, brings up such a question for its solemn adjudication?

It is a common but profound mistake to suppose that a court, having once acquired jurisdiction over the subject-matter and the parties, is omnipotent, and can do anything it pleases, and that its errors cannot be corrected except by an appeal to an appellate court. The jurisdiction of a court never transcends the powers conferred upon it by the law of its being and constitution. In the first place all of its power is judicial in its nature, and its acts are absolutely void, *ex necessitate rei,* unless that power is judicially exercised. In the second place jurisdiction cannot be exercised beyond the power conferred by law. Thus, in Bigelow vs. Forrest, 9 Wall., 339, the district court confiscated the whole fee simple estate of Commodore Forrest in the land in question, and this court held that the confiscation act of July, 1862, extended only to the life estate, and that the district court had no judicial power to confiscate the fee simple, that the court had transcended its power in so doing, and that its act was a mere nullity, even when attacked in a collateral proceeding, as in this case. That decision was affirmed by this court in Day vs. Micou, 18 Wall., 156, in which it appeared that Mr. Judah P. Benjamin, formerly of New Orleans, and now of London, England, had mortgaged certain real estate in New Orleans, and that the District Court of the United States for the district of Louisiana, in proceedings under the said act of Congress, had confiscated and sold the fee simple of the estate, and that the purchaser took a fee simple title; and this court held, in a collateral proceeding, that the purchaser took only subject to the mortgage of Mr. Benjamin, and in effect that so much of the decree of confiscation and sale of the district court as purported to condemn and sell the fee simple, in derogation of the rights of the mortgagee, was absolutely void for want of jurisdiction and transcendence of judicial power.

And in the very next case in that volume, namely, ex parte Lange, 18 Wall., 163, it was held that the court below, having transcended its judicial power, all its action thereafter was a nullity. The court said, p. 176, that the prisoner had been punished once, and that it was not in the power of the court to punish him again for the same offence; and that unless the whole doctrine of our system of jurisprudence, both of the constitution and the common law for the protection of personal rights, is a nullity, "the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist." And the court further say: "It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the constitution." And the court cited, approved and reaffirmed its decisions in *Bigelow vs. Forrest* and in *Day vs. Micou*, above cited.

If, where a court confessedly has rightful jurisdiction of the subject-matter and of the parties; if, where there is *contestatio litis* between the parties, and the parties, on notice and opportunity of being heard, are fully heard, upon the pleadings and issues made in the cause, and there is a judicial decision in a legal sense upon the issues made, the court *bona fide* exercise its judicial functions, and exercises those functions beyond the jurisdiction of the court, that exercise is a nullity, how can it be asserted or pretended that a person occupying a judicial position, but abnegating his judicial powers and functions, and banishing the party from his court whose rights and property were attacked by the proceedings, and thus ousting his jurisdiction as a judge to decide the questions involved, could be held to have passed judicially upon these questions? The

simple statement involves not merely a contradiction in terms, but a mockery of justice, and inspires feelings of abhorrence difficult to find too strong expression. And yet this is the only foundation of the asserted claim of the jurisdiction of this court in this case.

It is contended, however, as above stated, that the said proceedings in confiscation were proceedings *in rem*, to which all the world were parties, and that the jurisdiction of the court was obtained by the alleged judicial seizure of the property, (of which the record discloses an entire absence and negation, as will be hereafter shown), and that the court, having acquired jurisdiction *in rem*, its proceedings, though admitted to be erroneous, could only be corrected in the appellate court of error, and that therefore they were not void, but merely voidable.

The learned counsel for the plaintiff in error argues as follows (see rec., pp. 18–19):

"The cause being a cause in rem, the jurisdiction of the court became complete by the seizure of the property.

"The final purpose for which its jurisdiction was invoked was to decide whether the property seized was or was not liable to be condemned as forfeited. Having acquired, by the seizure, full jurisdiction to decide that question, it had, by consequence, jurisdiction to decide all questions incidentally arising in the progress of the cause, and the validity of its final decree could not be questioned collaterally because of erroneous ruling on any of the questions so incidentally arising.

"In cases in rem, it is a question frequently arising whether a person asking has a right to be admitted as a claimant in the case; but the validity of the final decree (as against collateral impeachment) has never been held to depend upon the ruling which the court might make on such a question. (See the Mary Anne, Ware's Reports, 104.)

"The jurisdiction acquired by the seizure of the res does not become divested by the erroneous exclusion of a party asking to be admitted as a claimant. The jurisdiction is not at all dependent upon the intervention or non-intervention of a claimant. The intervention of a claimant does not strengthen, the non-intervention does not impair, the jurisdiction. Having once attached by the seizure, it continues unaffected by either alternative, so that a title acquired under its sentence rests upon the basis of a judgment of a court of competent jurisdiction.

"The admission or exclusion of a person as a claimant is not a jurisdictional fact; does not involve any jurisdictional question. (Tyler vs. Defries, 11 Wallace, 331.)

"The corporation court held the sentence void, because of the refusal of the district court to admit McVeigh as a claimant; but if the foregoing views be sound, the sentence was not void but voidable only, and valid until reversed on error.

"Nor did the refusal to admit the claim of McVeigh bring the case within the operation of the principle that a judgment or decree against a man unheard is void. This principle finds application only in those cases where judgment has been rendered either without any issue of

process, or without any service of process upon, or without any process by, the defendant. No case can be found where the principle has been applied, unless it was a case involving one or the other of these conditions. But in proceedings in rem, where the res has been seized, neither of these conditions can exist, because the seizure of the property is service of process upon everybody. Moreover, in the particular proceedings involved in this case, there was, besides the seizure of the res, process of monition duly executed by publication, and an appearance actually put in by the claimant in response to the monition.

"Here, then, is the very opposite of those cases where the judgments are held nullities because rendered against a party unheard, where there was no notice or knowledge of the pendency of proceedings until after judgment rendered and all opportunity of defence had passed.

"It cannot be said of a person, who is before the court in response to its process, that he is condemned unheard, within the meaning of the principle referred to. His plea may be erroneously rejected; his motion erroneously denied; his claim and answer erroneously stricken out; yet it cannot be said he is denied his opportunity of defence. His defence and his opportunity of making it are still preserved to him, and preserved unimpaired; the only charge being that, for the further maintenance of his defence, he must resort to the court above; he is put to his proceeding in error, where his defence, if it be a good one, will be made to avail him as efficiently as if it had been allowed in the tribunal below. If the foregoing views be correct, then the sentence and the proceedings under it, on which the petitioner relied in defending the cause, were valid against all collateral impeachment, and the instructions asked by him should have been granted."

This is an imposing argument, and is marked by all the singular subtlety, acuteness and vigor of reasoning for which the eminent counsel is distinguished.

But the argument, it is respectfully submitted, ignores or misconceives the true nature of a proceeding *in rem*. We deny, indeed, that the proceeding in question was a proceeding *in rem*, pure and simple, or the character supposed; and we think it will be clearly shown, both upon principle and authority, that such was not the fact.

But conceding, *arguendo*, that it was purely a proceeding *in rem*, the question arises, what is the legal character of such a proceeding? Does it differ in any essential element from other legal proceedings before courts of justice in which a judicial determination of rights and liabilities is had? If so, no principle has been adduced and no case has been cited to establish any distinction, nor has any distinction been pointed out by the learned counsel. The great fundamental, essential and characteristic feature of all proceedings, judicial in their nature, is citation of parties and an opportunity to be heard in opposition to the demand asserted. Different modes of procedure as to citation or notice are adopted in different proceedings in different countries and at different times; but

all judicial proceedings are founded upon notice to the party to be affected thereby, and upon opportunity to be heard in his defence. Otherwise there could be no pleadings, except *ex parte* pleadings, which, in their nature, determine nothing judicially as against persons whose interests are not represented. Without notice and opportunity to be heard there could be no issues made for judicial determination; there could not be *actor, reus* and *judex,* which are necessary constituent elements of a judicial court.

The mode of procedure, as to citation or notice in a proceeding *in rem,* is different from the mode in a bill of equity or in an action at law. But they all have a common origin, and are of the same nature and have the same object. They all owe their origin to the civil law, especially proceedings in courts of equity and in courts of admiralty, in which last courts proceedings *in rem,* pure and simple, find their best illustration. Thus Greenleaf, after stating that, though the practice in courts of equity and admiralty is originally deduced from the common fountain of the civil law, it has acquired in its progress a diversity of modes from the different channels through which it has been drawn, and that, therefore, it is material to understand the leading rules of practice in the Roman tribunals, proceeds to state that in the earlier period of the Roman law the party aggrieved might summon his adversary in person, or, if he resisted or hesitated (*stuitve pedes*), might seize him (*obtorto collo*) and drag him before the *Prætor,* and then shows at length the modes of procedure and of pleading to bring the parties to issue, so as to present a proper subject-matter for adjudication; and several subsequent chapters of his excellent work are devoted, in teaching of admiralty causes, to the illustration of the modes and rules of pleading and evidence applicable thereto, which, in their essential elements, though differing in detail, are the same in principle as those which control other courts of justice. In speaking of a capture *dure belli,* and of the admiralty proceedings *in rem* thereon, after stating the substance of the libel and the prayer for process and monition, and a decree of condemnation of the property as lawful prize of war, he continues (3 Greenleaf on Evidence, §§ 442, 443): "If a *claim to the property is interposed* it should be made by the owner himself, if within the jurisdiction," (as was done in the case at bar); and he then shows how the claim should be made. And he thus proceeds: "Where *no claim is interposed,* if the property appears to belong to enemies, it is immediately condemned. If its national character appears doubtful, or even neutral, the court will not proceed to a final decree, but will post-

pone further proceedings, with a view to enable any person having title to assert it within a reasonable time; and this, by the general usage of nations, has been limited to a year and a day, that is, to a full year after the institution of prize proceedings. If no claim is interposed within that period, the property is deemed to be abandoned, and is condemned to the captor for contumacy and default of the supposed owner. In fine, the end of a prize court, as was said by Lord Mansfield, is to suspend the property until condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis velatis*, if, upon the most summary examination, there does not appear sufficient ground to condemn; but if the goods really are prize, to condemn finally against everybody, *giving everybody an opportunity of being heard.*" (See 3 Greenleaf Supra, §§ 442, 443, and §§ 389, 390, *et seq.*, Ch. II, Ch. III, Ch. IV, Ch. V.

How strangely does the above language sound, in connection with the striking from the files the appearance, answer and claim of the defendant, by *Judge* Underwood, in this alleged proceeding *in rem!* How strangely appears this denial of all opportunity of being heard, and then the subsequent arbitrary forfeiture and sale of the property of the owner by *Mr.* Underwood! If, even when no claim is interposed, and the right to condemn appears doubtful, the court will not proceed to a final decree, but will postpone further proceedings, with a view to enable any person having title to assert it within a reasonable time, which reasonable time is, by the general usage of nations, a full year after the institution of the prize proceedings; and if final condemnation is never had until and unless after "giving everybody an opportunity of being heard," how will the learned counsel sustain his position that proceedings *in rem* constitute an exception to the universal rule, elsewhere applicable to all judicial proceedings, that a man cannot be condemned, either as to his person or his property, without first having had accorded to him an opportunity of being heard in his defence?

Hear also what Story says upon the subject, in his Conflict of Laws—that great monument of his learning and judicial ability. After stating that whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every tribunal or country, when the proceedings are proceedings *in rem*, in courts of admiralty, whether they are causes of prize or of bottomry, or of salvage, or of forfeiture, or of any the like nature, over which such courts have a rightful jurisdiction,

founded on the actual or constructive possession of the subject matter (*res*), and that the same rule is applied to other courts proceeding *in rem*, such as to the court of Exchequer in England, and to other courts exercising a like jurisdiction *in rem* upon seizures, that eminent jurist qualifies the rule in the following remarkable and emphatic manner: "But the doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bona fide* and without fraud; for if fraud has intervened it will doubtless avoid the force and validity of the sentence. So it must appear that there have been regular proceedings to found the judgment or decree, and that the parties in interest *in rem have had notice, or an opportunity to appear and defend their interest, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard.*" Story on Conflict of Laws, § 592 and notes (2) and (3) Ed. 1857.

How does this great authority comport with the position of the learned counsel?

The only case cited by the counsel to sustain his extraordinary position is that of the *Mary Ann*, in Ware's Reps. (104), top paging 99; and that seems to have been a singularly unfortunate reference. The learned Judge Ware, a man of far more than ordinary legal erudition and judicial faculties, after stating the case, proceeds: "As a general principle it is certainly true that in admiralty process *in rem* all persons having an interest in the thing may intervene *pro inter esse suo*, file their claims and make themselves parties to the cause to defend their interests. The process acts on the thing itself and places it in the custody of the court. When thus in its possession the court is bound to preserve it for all who have an interest in it, and not to deliver it but to those who proved a title. It follows as a necessary consequence that all who have a legal interest *may appear and by suitable allegations and proofs show what that interest is, and claim to have it allowed.* If it were not so the greatest injustice would be done, because a decree of the court *in rem* is binding on all the world as to the points which are directly in judgment before it." And then the learned judge proceeds to show that the claimant to the property in question seized *in rem*, had such a claim in respect thereto as gave the court jurisdiction to decide it, and concludes by saying that "to decide that he cannot make himself a party to the cause before a decree on the merits, is to decide that he cannot be admitted to defend his rights at all." And accordingly the

claimant was allowed to prove his claim, (108), top p. 103. What comfort does the learned counsel gain from this, his only cited case, to show that a party whose property is seized in a proceeding *in rem*, is not entitled to be heard in his defence before his property is condemned and forfeited? What sanction is there here for the strange doctrine contended for, that the property of a citizen may be seized in a proceeding *in rem*, and be transferred to and appropriated by the government to its own use, without an opportunity to owner of being heard in his defence, and after he had been cited to appear and be heard, and that hearing has been denied to him?

It would seem to be unnecessary further to argue this point; but the authorities upon the subject are so full that a few citations perhaps may be pardoned. Thus in Mankin v. Chandler & Co., 2 Brock., 127, Chief Justice Marshall, in a case involving the legal nature of a foreign attachment, said: "What is the nature of a proceeding *in rem*, and in what does its specific difference from an ordinary action consist?" And he proceeds to say, in substance, that the seizure of the *res* is notice to its owner, because "it is presumable that the person whose property is seized is either himself attentive to it or has placed it in the care of some person who has the power, and whose duty it is to represent him and assert his claim. *Such claim may be asserted;* but the jurisdiction of the court does not depend on its assertion. The claimant is a party, whether he speaks or is silent, whether he asserts his claim or abandons it."

This, of course, implies that if a claim is asserted to the property seized, the party claiming it is to be heard, and *a fortiori* if the claimant is the owner of the property, and "such claim may be asserted" (in the language of the court), he is entitled to be heard before his property can be judicially divested from him and transferred to the Government. And the Chief Justice illustrated his judgment by the case of Scott v. Sherman, 2 W. Blacks. Rep., 976, in which the principle of the necessity of notice, and "the *opportunity of putting in by the owner of his claim and trying the point of forfeiture*," is beautifully exemplified by the decision of Sir Wm. Blackstone.

In Croudson v. Leonard, 4 Cranch, 437, which was a case upon a policy of insurance on the cargo of the brig *Fame*, on a voyage in which the brig was condemned in admiralty for a breach of blockade, and in which the question was whether the insurance company, which had insured the cargo, was bound by the decision of the court of admiralty proceeding *in rem* that the *vessel* was lawfully condemned for breach of

blockade, it was said by Judge Washington: "The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer." And therefore, because the insurer thus had notice and had an opportunity to controvert "the alleged grounds of condemnation," he was held, and very properly held, bound by the condemnation which was made; but, by hypothesis, of course, the case assumed and implied that the insurer had an opportunity of being heard in his defence, in order "to controvert the alleged grounds of condemnation."

In the Mary, 9 Cranch, 146, the decision of the court in that case, and the language of Judge Washinton, is cited and approved by Chief Justice Marshall, delivering the unanimous opinion of the court, and after quoting the language above stated, the chief justice said: "The very foundation of this opinion, that the insured is bound by the sentence of condemnation, is that he was in law a party to the suit, *and had a full opportunity to assert his rights.*" The Mary was condemned as lawful prize of war, because, after due process of citation, by proclama and publication in the usual course of admiralty proceedings *in* no claimant appeared and made claim to the ship. But it was held the condemnation of the ship did not, under the circumstances, [illegible] the cargo, and so held upon the *principle* that the owner of the cargo "had no interest in the *vessel* which could be asserted in the court of admiralty, had no notice of her seizure, and could on no principle of justice or reason be considered a party in the cause so far as respects the vessel;" and, therefore, the owner of the cargo, not having notice *or an opportunity to be heard* as to the condemnation of the vessel, was held not to be affected by such condemnation. The court say, pp. 144, 145, of 9 Cranch: "The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice—of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served person-

ally or by publication: where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is a part of common prudence for all those who have an interest in it to guard that interest by persons who are in a situation to protect it." (See The Neptune, 3 Hag. Ad. R., 132; The Attorney-General vs. Norstedt, 3 Price, 109; Benedict's Admiralty, § 364, 365.)

This celebrated judgment it is unnecessary to argue presupposes and implies not merely the necessity of notice in order to bind a party whose interest is seized *in rem*, but also an opportunity of being heard in his defence, and, in the express language of the Chief Justice, "to guard that interest by persons who are in a situation to protect it."

It has thus been demonstrated that in the simplest and purest form of a proceeding *in rem*, the principle of notice, and of *a right to be heard* in judicial proceedings upon proper pleadings and issues made, is absolutely essential before the property of any man can be judicially condemned and divested. It is true the court has jurisdiction to condemn whether he speaks or is silent; but if he speaks he is entitled to be heard, else why should he speak? If he speaks, *the jurisdiction is then to hear*, and to condemn only after hearing.

Unless this be so all process of monition by publication, posting and proclamation is worse than a useless formality. It would be to keep the word of promise to the ear and break it to the hope. It would be sheer mockery of justice and solemn trifling with forms to evade the substance. So far is it from being true that proceedings *in rem* constitute an exception to the general rule, those proceedings, beyond all others, especially in admiralty causes, their purest form, furnish to claimants the fullest opportunity to be heard, and are based and conducted upon the most liberal and equitable principles of enlightened jurisprudence. Nowhere are technical formalities less regarded, and nowhere is substantial justice more strictly and fully administered. Thus, for instance, in prize causes the fullest opportunity is afforded to parties for the collection and preparation of their evidence, and for amendment and rectification of their pleadings, if necessary or proper, to advance the ends of right and equity; and this court has often, in sitting on Appeal in such causes, directed, in furtherance of justice, additional evidence to be taken, in order that the rights and liabilities of the Government, on the one side, and the claimants on the other, might be

adjudicated upon a fair and full hearing of the parties.* In no other judicature are the philosophic remarks of Mr. Burke upon the necessity of the fullest inquiry and examination in judicial proceedings more signally recognized and illustrated in practice: "There is necessarily some limit, but a limit hard to fix. The only one which can be fixed with any tolerable degree of precision is when the judge, after fully hearing all parties, is to consider of his verdict or his sentenced. Whilst the cause continues under hearing, in any shape or in any stage of the process, it is the duty of the judge to receive every offer of evidence apparently material, suggested to him, though the parties themselves, through negligence, ignorance or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, *and that duty is to investigate the truth.*" Report from Committee appointed to inspect the Lord's Journals. Burke, Bohn ed., 6 vol., p. 496.

The contention is, that in a proceeding *in rem* the admission or exclusion of a person as a claimant is not a jurisdictional fact, and that the jurisdiction is not at all dependant upon the intervention or non-intervention of a claimant. But surely, as all the world are said to be parties, because all the world have notice and are entitled to an opportunity to be heard, if all the world are excluded from becoming claimants, how could they be affected by the proceedings had after their exclusion? And if one claimant can be excluded, why not all? To exclude from claiming is to exclude from condemnation the rights which are claimed, because those rights are thus placed out of the jurisdiction of the court; and thus by this process of exclusion, the court would presently find itself with nothing to decide. A condemnation as prize of war may seem to present an exception so far as the enemy owner is concerned, but that is because the enemy owner has no *locus standi in judicio*, since when he shows himself to be an enemy, his property is thereby *ipso facto*

*Thus says Benedict: "The admiralty court is bound to determine the cases submitted to its cognizance upon equitable principles and according to natural justice. This principle of the maritime law pervades also the whole practice of the admiralty in the United States. The grand object of jurisdiction between the parties is superior to technical rules and forms, and where the stricter practices of the English common law or the civil law would turn a party out of court or defeat or pervert justice by considering an arbitary rule of proceeding as paramount to all other considerations, the American admiralty finds in the educated reason and cultivated discretion of the court the means of defeating chicanery, rectifying mistakes and supplying deficiencies, and suggesting to the party the means of reconstructing his case if necessary without loss of real progress as he may have already made." Benedict's Admiralty, p. 358, §483, §516.

shown to be lawful prize of war, and rightfully subject to forfeiture to the captor; but if from any cause, notwithstanding his hostility, he could show himself entitled to be heard, and also that his property was not subject to capture, how could his claim be excluded, without excluding his right from the jurisdiction of the court? An illustration is well put by Mr. Curtis, *arguendo*, in McVeigh vs. United States, 11 Wall. 264. "Suppose a British ship, in the event of a war with England, is captured, belonging to a British owner, and he comes into a court of admiralty and files an answer and claim. If, indeed, he said 'I am an inhabitant of the enemy's country, and this is my property,' he would state himself out of court; but suppose he says, 'when that ship was captured, she was under your *cartel;* I will prove it;' is there any doubt that he is to be listened to?" See United States vs. Certain Shares of Stock, 5 Blatchford, 231.

When it is said that jurisdiction does not depend upon the intervention or non-intervention of a claim, the proposition rightly understood is correct. If the court has acquired jurisdiction by a lawful seizure, that jurisdiction may be exercised to condemn, although no claim be interposed. But if a claim is interposed, then the powers of the court are put in motion to decide upon the merits of the claim, if the claimant is in a legal position to be heard. If the court takes jurisdiction to make such decision, the decision, though erroneous, is not void, but is voidable only on appeal to a higher court. If, however, instead of assuming jurisdiction to decide the legal rights and questions presented by the claim, the court declines that judicial duty, and refuses the claimant an opportunity of litigating his rights, by dismissing his appearance and claim from its presence and action, it seems impossible to understand how it can be held that the rights of the claimant have thereby been adjudicated—adjudicated by an abandonment and abnegation of jurisdiction! It would appear to be the requirement alike of common sense and of common justice, that after the claimant ceased to be before the court, by a compulsory departure and absolute banishment, the action thereafter had in respect to his property and rights of property, was simply *coram non judice.* From the moment of his expulsion, he became a stranger to the proceeding. It would seem that no argument or illustration is needed, or possible, to add light or force to this simple statement.

When it is said that the admission or exclusion of a person as claimant is not a jurisdictional fact—does not involve any jurisdictional question—the proposition is to be considered in the light of these ob-

vious truths; and, so considered, it abundantly appears, that it furnishes no foundation for the argument, that jurisdiction having been acquired by seizure, the person sitting in a judicial position could do what he pleased with the property, and condemn and transfer it to the government by an autocratic exercise of his volition, in the absence of the owner, whom and whose rights he had expelled and excluded from judicial consideration.

It is also gravely contended, that an opportunity of being heard was not denied to the defendant in error, because he had an opportunity of being heard in an appellate court. But the reply to this is plain. If he could be deprived of a hearing in the lower court, and his rights of property adjudicated in his absence, why could not the same thing be done in the appellate court? And thus the claimant be denied all rights and remedy whatever? The true question is, not what remedy the claimant had in an appellate court to reverse the *ukase* of usurped and arbitrary power, but what were his rights to be heard in the District court, before any decree or sentence could be passed affecting his rights of property? The void edict of the person who had abdicated his judicial powers and functions, undoubtedly might have been reversed and set aside as his similar action was almost contemptuously reversed and set aside in the identically like case of McVeigh vs. United States, in 11 Wall., so often referred to in this argument. In exparte Lange, 18 Wall., 175, the court say: "A judgment may be erroneous and not void, and it may be erroneous *because* it is void." And the court has not hesitated to take jurisdiction to set aside a void judgment, on appeal or writ of error, as is shown in Morris's Cotton, 8 Wall., 511–12. But that course of practice, so proper in itself, does not exclude the right of a party to attack a void judgment in a collateral proceeding, and it is difficult to imagine why if a so-called judgment be void in the District court, because the party whose rights it attempted to affect was denied an opportunity of being heard in his defence, it became less void because it might have been formally held void in an appellate court, or why, if it was void, because of a want of hearing, it was necessary to have it so declared by an appellate court, when it might be equally as well treated as a nullity and disregarded in a collateral proceeding.

We have thus far proceeded upon the *concession* that the proceeding in confiiscation was a proceeding strictly *in rem*. It is respectfully submitted, however, that such was not the fact. The proceeding was one in the nature of a proceeding *in rem*, and also *in personam*. The legal character of the proceeding is sufficiently explained and illustrated in

the cluster of confiscation cases reported in 11 Wall., and also in subsequent cases under the confiscation act in question. In the first place, the act of Congress was not a legislative act of confiscation, operating *proprio vigore*, to condemn and forfeit indiscriminately the property of all persons engaged in the Confederate cause and by the act declared to be rebels and enemies; if so, no judicial proceedings would have been necessary to effectuate the forfeiture, any more than such proceedings were necessary to effectuate the legislative acts of confiscation of the property of British subjects passed by Maryland and other States during the Revolutionary war. Nor was the act of Congress designed to place the property of the hostile Southern citizens on land, under the domination and jurisdiction of the armies and Government of the United States, in the category and predicament of enemies' property captured on the high seas or within waters of maritime jurisdiction as lawful prize of war. Nor was it the purpose of the act to conform the proceedings thereunder strictly to the proceedings in admiralty causes of prize; on the contrary, such a proceeding—that is to say, a libel charging a seizure of land—could not have been tried in a court of admiralty; for, in the language of Chief Justice Marshall and of this court, "any proceeding of the court, as a court of admiralty, after the fact that the seizure was made on land appeared, would have been a proceeding without jurisdiction."—The Sarah, 8 Wheat., 302; approved in Insurance Co. vs. United States, 6 Wall., 765; in Armstrong's Foundry, 6 Wall., 769; in The Confiscations Cases, 7 Wall., 402; and in Morris's Cotton, 8 Wall., 511; and it is now the accepted law of this court that cases under the said confiscation act of 1862 were triable only before a court and jury upon issues properly made and submitted between the government on the one side and the claimant of the property seized on the other.

If you look at the act of Congress, you will see that in the 5th and 6th sections, there are certain classes of persons therein referred to and enumerated, whose property within the jurisdiction and dominion of the United States, is declared liable to confiscation, upon proceedings to be had, prescribed by the act.

Those persons are described as being in an attitude of criminality towards the United States, and the acts of crime of which they are charged to be guilty are particularly specified. In any judicial charge or prosecution under the act, against any particular person alleged to be within the catagory specified, whose property was sought to be confiscated to the government, two questions necessarily arose for judicial

determination, the facts to be found by a jury upon issues properly made, and the government and the party accused having a fair opportunity to be heard, and the law to be applied by the court as the facts might be found by the jury. Those questions were— first, whether the thing seized was the property of the person charged with the offences enumerated; and secondly, whether the person so charged with those offences was guilty of them, or of any of them.

That was in its nature necessarily a judicial inquiry; it depended upon the facts to be found on issues properly joined, and the law of the case as applied to those facts. The alleged criminality of the defendant in error could only be ascertained after such judicial inquiry, and until that criminality had thus been judicially ascertained and determined, of course his right and title to his property seized could not be judicially divested from him and forfeited to the government.

This great fundamental issue as to his alleged criminality, Mr. McVeigh was never allowed to make—he did offer to make it, indeed, but his tendered issue was stricken out, and he was denied all opportunity of being heard in his defence, and an arbitrary edict was proclaimed of his guilt, under the act of Congress, and of the condemnation and forfeiture of his property to the government.

The simple question for this court now to decide is, whether such edict was a judicial act? Whether it was the *judgment* of a court of justice?

The question has already been fully answered by the court, in McVeigh vs. United States, 11 Wall., p. 266. The court say: "His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offences charged which rendered it liable to forfeiture. The questions of his guilt and ownership were therefore fundamental in the case. The notice by publication was given to bring him constructively before the court—it was in the nature of a substituted service of process. If he failed to appear his absence and silence could not affect the validity of the proceedings.

* * * The case is wholly unlike a proceeding purely *in rem*, where no claimant is named, and none appears until after the final decree or judgment is entered and the case has terminated * * * * The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there he could defend there—the liability and the right are inseparable. A different result would be a blot upon

our jurisprudence and civilization. We cannot hesitate or doubt on the subject; it would be contrary to the first principles of the social compact and of the right administration of justice."

This court has never said anything inconsistent with the principles adjudicated in that great case. On the contrary, the case has been frequently cited and approved by the court, and it cannot now be doubted as the established construction of the act of Congress in question. And it may be forgiven to add that few decisions since the late unhappy war, upon any litigation arising out of it, have excited more general attention or commanded more cordial approval, in the profession, and throughout the country; and that while by its right logic and inherent equity, it challenged and received the fullest acquiescence as the true exposition of the law, it was considered, by Southern citizens especially, with admiration and gratitude, and gave new inspiration and strength to their confidence, that, in times to come, as in times past, the adjudications of the supreme tribunal of the land will be signalized by a firm determination to administer justice irrespective of persons and of sections. The case was one of five or six under the statute which were before the court at the same time. In Tyler vs. Defrees, 11 Wall. 346 (the last of them), the court say that they all had been argued at the preceding term, and that, appreciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at the then present term, and had under that order been ably and fully re-argued; and the decision in the McVeigh case well exemplified the additional remark of the court, that where there had appeared to be a substantial departure from the mode of proceeding directed by the statute, the court had not hesitated to reverse the decree of the courts below in the cases which were here on error to those proceedings.

The subsequent history of that case is alike interesting and instructive as illustrating the point for which we are contending. The mandate of this court was that the judgment of the district court be reversed, and that the cause be remanded to the circuit court with directions to proceed in it "*in conformity to law.*" The cause was accordingly remanded to the circuit court of the United States for the district of Virginia for such proceedings. It came on to be heard in the October term of 1871. At that time Mrs. Maria J. Underwood, the wife of the judge of the district court, whose edict of confiscation was described by this court in the language above quoted, appeared by counsel, L. H. Chandler, Esq., the late district attorney, on whose motion that action

had been taken, and claimed the large property involved as a *bona fide* purchaser at a judicial sale, whose rights could not be affected by the reversal of the decree which had directed the sale. The Government was represented by H. H. Wells, Esq., then district attorney, under whose favor and countenance Mr. Chandler appeared for Mrs. Underwood to contest the rights of Mr. McVeigh, if not to aid the Government in the prosecution. The first question was, what were the proper "proceedings in conformity to law?" We contended for Mr. McVeigh that all of the proceedings, after his dismission from the district court, and a denial to him of a hearing, were *coram non judice* and absolute *nullities*, and that the right proceedings to be had were to allow him to appear by counsel and plead to the libel, and file his claim, and that the claim of title by Mrs. Underwood, under her husband's order, was void, and that the proceedings should progress precisely as if the order of forfeiture and sale had not been made. I well remember, that in arising to make the concluding argument in this contention for McVeigh, I had hardly stated the case, as understood by me, before I was promptly stopped by the court, (Hon. Hugh L. Bond), by the remark that it was unnecessary to proceed further, that there had been no decree of forfeiture and no sale, and that the cause must proceed as of the time of the alleged seizure of the property. And thereupon proper pleadings were had, and upon the hearing the libel was, without hesitation, dismissed. Unfortunately, however, the Underwoods were left in possession of the property. This necessitated an action of ejectment to recover possession. The action was brought in the corporation court of the city of Alexandria, in which the property is situated, and in that action the learned counsel who now appears for Windsor and Gregory, plaintiffs in error, contended, as he now contends, that the famous *rescript* of confiscation was not void, but only voidable, and that Mrs. Underwood and her trustee, *Force*, (who had been made trustee by conveyance from her husband and herself after the institution of the action), were purchasers at a judicial sale, and were not affected by the reversal by this court of the so-called decree of condemnation and sale. We contended for Mr. McVeigh that the decree was a nullity, and that the circuit court of the United States had properly held it so to be. The counsel for the defendants prayed for an instruction to the jury—that the alleged decree divested the life estate of Mr. McVeigh and transferred it to the goverment of the United States, and that the United States had made a valid transfer of it to the judge of the court, who claimed to have been the purchaser

under his so-called judicial sale. It is pertinent to point out that the instruction thus prayed for was copied and prayed for *verbatim et literatim* in the cases of McVeigh vs. Windsor, and McVeigh vs. Gregory, now under consideration. The instruction was refused by the corporation court, and there was a verdict and judgment for Mr. McVeigh against the Underwoods. Then the Underwoods appealed to the Supreme Court of Appeals of Va., and there the same contention arose before that court. For the Underwoods it was argued by the counsel who now appears for Windsor and Gregory, that the decree of forfeiture and sale was voidable and not void. We contended on our side that it was a nullity, and the court so held in an elaborate judgment. Underwood vs. McVeigh, 23 Grat., pp. 417, 418, 419, 420, 421. The Underwoods obtained a writ of error from this court under the 25th section of the Judiciary Act. The court, on the motion made, as now made here, to dismiss the writ for want of jurisdiction, granted the motion and dismissed the writ. It was understood at the time that the dismissal was put upon the technical point that the writ had been directed to the corporation court of Alexandria, instead of to the Supreme Court of Appeals of the State, which was much regretted, as it left undecided the great question in controversy, upon which other important cases depended, and to decide which those now before the court have been brought.

This sketch of the litigation shows that in every court, State and Federal, in which the question has been adjudicated, it has been in effect held that there never was a decree of forfeiture and sale in the district court.

The uniform ground upon which these decisions have been placed is that first announced by this court in the United States vs. McVeigh, namely, the necessity of a hearing before adjudication, or, in other words, the want of jurisdiction to condemn, after the accused owner had been dismissed from the court without a hearing.

But there was want of jurisdiction in the district court to render the decree of forfeiture for another reason, which, strangely enough, has heretofore escaped attention. It seems to have escaped the attention of the eminent counsel, and of this court itself, in the leading case of United States vs. McVeigh—at least it is not noticed in the argument on either side, or in the opinion of the court. And yet it is obvious that the point directly arose for decision, and that it had been often before decided by the court. The point is, that the District court, in confiscation cases concerning property on land and land itself, was not

sitting as a court of admiralty, in which it could decide the facts as well as the law, but was sitting as a court of common law, and therefore it had no jurisdiction to conduct its proceedings according to the mode of procedure and practice in an admiralty cause, as of prize on the high seas or the navigable waters within the admiralty and maritime jurisdiction, but had jurisdiction to proceed only as in an action at common law, with trial by jury; and that the District court, having assumed jurisdiction to adjudicate as a court of admiralty, its assumption of such jurisdiction and its decree thereunder of condemnation and sale was a mere nullity.

The records in these cases show (the Windsor case, rec. p. 11, and the Gregory case, p. 11) that after having dismissed the defendant in error from court, the district court proceeded to enter his default for non-appearance (!), and then to call witnesses to give in evidence on the charges made against him in the libels, and upon "due deliberation" (!!) ordered, adjudged and decreed the sentence of condemnation and sale. Of course all this was *coram non judice*, and utterly void. See the cases cited *supra*. (The Sarah, 8 Wheat, 394–5; 6 Wall., 765, 769; 7 Wall., 402; 8 Wall., 511.

Thus, in the leading case of the *Sarah*, Chief-Justice Marshall, as the voice of the court, said that when it appeared that the property seized was on land, it was shown that the district court, as a court of admiralty, "had no jurisdiction." All of the cases since the *Sarah* recognize and affirm that decision. Thus, in the confiscation cases, 7 Wall., 462, the court say: "When the seizure was made on navigable waters, the case belongs to the instance side of the subordinate court; but when the seizure was made on land, the suit is one at common law, and the claimants are entitled to trial by jury." And the *Sarah* is referred to as authority; and also 3 Greenleaf on Ev., § 396; 1 Kent's Com. (11th ed.) 337; Armstrong's Foundry, 6 Wall., 769.

In some of the decisions (as in *Armstrong's Foundry*, and in *Morris' Cotton*) this court assumed jurisdiction on appeal or writ of error, but not to decide the principles or merits of the cause involved, and only to reverse the proceedings of the lower court, for want of jurisdiction on their part, and because the proceedings, while erroneous, were also void, and ought, in futherance of justice, to be set aside. Thus, in the case of *Morris' Cotton*, the court say: "Where the seizure is made on navigable waters, within the ninth section of the *Judiciary* Act, the case belongs to the instance side of the District Court; but where the seizure was made on land, the suit, though in the form of a libel of in-

formation, is an action at common law, and the claimants are entitled to a trial by jury." And the court proceeded to say "that want of jurisdiction in the court below did not prevent this court from assuming jurisdiction on appeal for the purpose of reversing the decree rendered by that court, and of vacating any unwarranted proceedings of that court," and that "unless the practice were as explained, great injustice would be done in all cases where the judgment or decree was in favor of the party who instituted the suit, rendered by a court, in his favor, which had no jurisdiction to hear and determine the controversy." 8 Wall., 511–512. And that was a case in which all the three Acts of Confiscation passed during the war—that of July 13th, 1861; that of August 6th, 1861, and that of July 17–18th, 1862—were under consideration.

If, when the accused owner was before the court, he was entitled to trial by a jury at common law, and the court had no jurisdiction to adjudicate a forfeiture without such trial, it is not perceived that his enforced absence conferred such jurisdiction upon the court. The court, by the law of its constitution and the laws conferring special jurisdiction upon it, had no jurisdiction to condemn, except as a court of common law, and it attempted to act as a court of admiralty, and, of course, its action was void.

The foregoing argument has preceeded upon the hypothesis that there was in these cases a valid judicial seizure of the property in question. It will now be shown that no such seizure was ever made.

By an inspection of the record, it will be discovered that there was simply an executive seizure by the direction of the District Attorney Chandler, on the 22d July, 1863, to the marshal, to seize the property, and make a report to him of such seizure as district attorney. On the same day the marshal reported to the district attorney that he had made the seizure as directed. The libel of information was filed on the 26th August, 1863. It set forth that the lot of land in question was the property of W. N. McVeigh, and it charged that he was guilty of the offences enumerated in the 5th and 6th sections of the said confiscation act of 1862. And it prayed for an order of monition, by publication, &c., against all persons, but did not pray for an order of judicial seizure, as it ought to have done, in accordance with the usual practice in such proceedings *in rem*. On the 27th August, 1863, in conformity to the prayer of the libel, the court entered an order of monition, but did not enter any order for seizure. And, of course, none was ever made. On the contrary, the record shows that the proceedings were had upon the hypothesis that the executive seizure was a judicial seizure. It is ad-

mitted that the statute should receive a fair construction, and that it should be fairly administered, without too nice a regard to technical forms. But it is not understood how a mere executive seizure can be held to have been a judicial seizure. The case is considered to be clearly distinguishable from Miller vs. United States, 11 Wallace, 268, in which there was an order of court for a judicial seizure, and in which there was a constructive seizure deemed by the court a valid judicial seizure; and to be equally distinguishable from Tyler vs. Defrees, 11 Wall., 331, in which it was held that there having been passed by the court a judicial order of seizure, and the marshal having previously reported to the court that he had seized the property under the executive order, and held it subject to the orders of the court, it was a mere useless formality for the marshal to make a return to the court that he had made another seizure, and that he held the property subject to the orders of the court. Here there was not even a prayer for a judicial order of seizure, and no such order was entered, and of course none ever could have been executed. And there never was any report made to the court by the marshal that he had made any seizure at all. His action was purely executive, and his report was to the executive, as directed. It is true that the district attorney filed in the court, the return of the marshal to him, of the execution of the executive order. It is also true that the libel states that such an order had been executed. And that is all which goes to show that there was any judicial seizure and jurisdiction in the case. See the Windsor record, pp. 5, 6, 7, 8, 9. The Gregory record presents the same facts, which is further evidence that both the district attorney and the judge were of opinion that no judicial seizure was necessary, and hence none ever was ordered or made. Unless it can be held that an executive seizure and a judicial seizure are identical, it would seem here very clearly to appear that the court never exercised its judicial power to acquire jurisdiction in the cases.

It is right to point out that in the clerical *precipe*, addressed to the marshal, and directing him to make sale, there is a recital that the court had seized the property; but it is obvious that the seizure referred to was that which has been above explained, for the record discloses none other, and is pregnant with negation of the fact of any other seizure. And it is also pertinent to observe, that the defendant in error was not then before the court, and that no orders or recitals made in respect to him, or his property, after his expulsion, are of any validity or effect as against him, or as against his legal rights.

Upon the three foregoing grounds, which may be reversed in the

logical order of their enumeration—first, that the court never acquired jurisdiction of the property at all, because it never exercised its judicial right to seize it; secondly, that, if that be not so, yet that having dismissed the accused owner without a hearing, it had no judicial power or jurisdiction to adjudicate his rights in his absence, or to pass any order in the cause until it had first cited him again to appear and assert his rights; and, thirdly, that whether the accused owner was present or absent, the court had no jurisdiction *to adjudicate a forfeiture of land* without a trial by jury, and no trial was had;—upon these separate, but concurrent grounds, we contend that no judicial forfeiture was ever made of the *locus in quo* sued for in this action of ejectment, and that the corporation court merely found that to be a fact proved in the case by the plaintiff in error himself, and therefore refused the instruction prayed for, which was based upon the hypothesis of the existence of such a forfeiture. The State court in so doing necessarily indeed had to make such inquiry into the evidence of the existence of the alleged forfeiture as to enable it to form a judgment whether it existed, and it decided that there was no evidence of the existence of such a forfeiture. To hold that such a decision was the decision of a Federal question would be against the precedents of this court. The precedent in Millinger vs. Hartupe, 6 Wallace, 258, has already been cited. The precedent in Mining Company vs. Boggs, 3 Wall., 304, may be added. Boggs, lessee of Fremont, brought suit in one of the State courts of California against the Mercer Mining Company to recover the possession of certain mineral lands situated in Mariposa county. The company claimed title under an alleged license from the United States to work the mines for the purpose of extracting gold from the rock. The State court necessarily had to inquire whether the license claimed had any existence, and for that purpose the case, having been by the California practice submitted to the court, both as to matters of fact and matters of law, without a jury, the court held that there was no proof to show the license claimed. The case came here from the supreme court of California, and there was a motion made to dismiss it for want of jurisdiction, because no Federal question was raised for decision, and the motion was granted. The court say that: "There was no decision of the (State) court against the validity of such a license. The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation in de-

mitted that the statute should receive a fair construction, and that it should be fairly administered, without too nice a regard to technical forms. But it is not understood how a mere executive seizure can be held to have been a judicial seizure. The case is considered to be clearly distinguishable from Miller vs. United States, 11 Wallace, 268, in which there was an order of court for a judicial seizure, and in which there was a constructive seizure deemed by the court a valid judicial seizure; and to be equally distinguishable from Tyler vs. Defrees, 11 Wall., 331, in which it was held that there having been passed by the court a judicial order of seizure, and the marshal having previously reported to the court that he had seized the property under the executive order, and held it subject to the orders of the court, it was a mere useless formality for the marshal to make a return to the court that he had made another seizure, and that he held the property subject to the orders of the court. Here there was not even a prayer for a judicial order of seizure, and no such order was entered, and of course none ever could have been executed. And there never was any report made to the court by the marshal that he had made any seizure at all. His action was purely executive, and his report was to the executive, as directed. It is true that the district attorney filed in the court, the return of the marshal to him, of the execution of the executive order. It is also true that the libel states that such an order had been executed. And that is all which goes to show that there was any judicial seizure and jurisdiction in the case. See the Windsor record, pp. 5, 6, 7, 8, 9. The Gregory record presents the same facts, which is further evidence that both the district attorney and the judge were of opinion that no judicial seizure was necessary, and hence none ever was ordered or made. Unless it can be held that an executive seizure and a judicial seizure are identical, it would seem here very clearly to appear that the court never exercised its judicial power to acquire jurisdiction in the cases.

It is right to point out that in the clerical *precipe*, addressed to the marshal, and directing him to make sale, there is a recital that the court had seized the property; but it is obvious that the seizure referred to was that which has been above explained, for the record discloses none other, and is pregnant with negation of the fact of any other seizure. And it is also pertinent to observe, that the defendant in error was not then before the court, and that no orders or recitals made in respect to him, or his property, after his expulsion, are of any validity or effect as against him, or as against his legal rights.

Upon the three foregoing grounds, which may be reversed in the

logical order of their enumeration—first, that the court never acquired jurisdiction of the property at all, because it never exercised its judicial right to seize it; secondly, that, if that be not so, yet that having dismissed the accused owner without a hearing, it had no judicial power or jurisdiction to adjudicate his rights in his absence, or to pass any order in the cause until it had first cited him again to appear and assert his rights; and, thirdly, that whether the accused owner was present or absent, the court had no jurisdiction *to adjudicate a forfeiture of land* without a trial by jury, and no trial was had;—upon these separate, but concurrent grounds, we contend that no judicial forfeiture was ever made of the *locus in quo* sued for in this action of ejectment, and that the corporation court merely found that to be a fact proved in the case by the plaintiff in error himself, and therefore refused the instruction prayed for, which was based upon the hypothesis of the existence of such a forfeiture. The State court in so doing necessarily indeed had to make such inquiry into the evidence of the existence of the alleged forfeiture as to enable it to form a judgment whether it existed, and it decided that there was no evidence of the existence of such a forfeiture. To hold that such a decision was the decision of a Federal question would be against the precedents of this court. The precedent in Milling[illegible]r vs. Hartupe, 6 Wallace, 258, has already been cited. The precedent in Mining Company vs. Boggs, 3 Wall., 304, may be added. Boggs, lessee of Fremont, brought suit in one of the State courts of California against the Mercer Mining Company to recover the possession of certain mineral lands situated in Mariposa county. The company claimed title under an alleged license from the United States to work the mines for the purpose of extracting gold from the rock. The State court necessarily had to inquire whether the license claimed had any existence, and for that purpose the case, having been by the California practice submitted to the court, both as to matters of fact and matters of law, without a jury, the court held that there was no proof to show the license claimed. The case came here from the supreme court of California, and there was a motion made to dismiss it for want of jurisdiction, because no Federal question was raised for decision, and the motion was granted. The court say that: "There was no decision of the (State) court against the validity of such a license. The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation in de-

fence to an action of ejectment of a patent from the United States, with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny not the validity, but the existence of the patent. And this court would have no jurisdiction to renew it."

The only difference between the California case and the Virginia case is a difference as to the mode in which the question was presented to the State court for decision. The actions in both cases were in ejectment to recover possession of the property claimed. The one case came before the court upon the law and facts, and the other case came before the court on an instruction to the jury upon the facts. In both cases the existence of a grant from the United States was set up in defence. The existence of the grant was the matter in controversy. In both cases it was held upon the evidence that the alleged existence of the grant was not proved. And that was all that was held by the State court in either case.

If there was no Federal question in the California case, there can be none in the cases now before the court; and we therefore ask that the cases may be dismissed upon the ground that no Federal question is raised for adjudication.

II. Should the court (if possible) not concur in the result of the foregoing views, then we ask that the writs may be dismissed, because they were directed to the corporation court of Alexandria, instead of to the supreme court of appeals of Virginia.

The law is that the writ should be directed to the highest court of law or equity in a State in which a decision in the suit could be had. In these cases the judgments were rendered by the corporation court of Alexandria. By the law of Virginia there might have been writs of error and supersedeas from the supreme court of the State to that court, and such a writ was actually issued by the court of appeals in the similar case of Underwood vs. McVeigh; which case finally went to this court, and was dismissed as above shown, because the writ of error from this court was directed not to the court of appeals, but to the corporation court. The court of appeals, therefore, was the highest court of law in the State in which a decision upon the cases could have been had. That court has never acted upon any writ of error in either of the cases. It is true that petitions for the writs, addressed to the court, were refused by the several judges of the court in vacation. They had no jurisdiction to grant the writs as a court at the time and place when, as individual judges, acting out of court in vacation, they refused the

writs. This is familiar knowledge to us in Virginia. The city of Alexandria is embraced within the local jurisdiction of the court of appeals, sitting as a court in the city of Richmond. When the court, in the summer or fall, sits in Wytheville or Staunton, it does not, by the law of its constitution and government, sit as a court having appellate jurisdiction in civil causes arising within the Richmond district. When the several judges at Wytheville or Staunton exercise any office or perform any duty as a jugde, except as a court having jurisdiction of civil cases respectively arising within those districts, or in criminal cases from any part of the State, the act is done by the individual judge as an act in vacation, so far as the Richmond district is concerned.

This view of the law is recognized by the counsel for the plaintiffs in error, in his request to the several judges as certified by them, in their certificates of refusal of the writs out of court. The respective judges were willing, in courtesy to the counsel, to grant his request so to certify their refusal; but I have the best authority for stating that it was so granted merely to comply with that request, in the willingness of the judges, after refusing the writs, to give to the counsel the advantage of the order stating the refusal and directing the clerk of the corporation court to enter it in vacation, for whatever such an order might be worth to the counsel or his clients, and that no judicial responsibility, as a court, was intended to be assumed by the judges in the matter. By what authority in the law of Virginia such an order could be directed to the clerk of the corporation court, by any one of the judges, or by all of them, acting out of court, in vacation, I do not know. Certainly there is no statute conferring such authority. It was in fact a mere nullity, except as an evidence of the refusal of the writs by the several judges acting in vacation. The clerk of the corporation court had no authority to enter the order. When entered, it was not the judgment of the corporation court, nor the judgment of the Supreme Court of Appeals of Virginia sitting within the Richmond district having jurisdiction to render any judgment in the premises. It was as much the judgment of the clerk as it was of that court.

There is another view of the subject equally conclusive. The writs were refused, out of court, in vacation. When the court afterwards was sitting in Richmond, and had jurisdiction to grant the writs, petitions for them might have been presented and granted, notwithstanding the action of the several judges out of court in vacation; for the court never having acted upon the petitions, and having previously had no jurisdiction to act upon them, would have been bound to receive and con-

sider the petitions, and to grant or refuse them, as upon the grounds then presented, their judicial determination as a court might have required.

It has thus been shown that the highest court of law in the State has never passed any judgment upon the alleged Federal question in the cases now before the court, and therefore this court has no jurisdiction to revise judgments of the Supreme Court of Appeals of Virginia which were never rendered.

Let it be conceded, however, that the foregoing views are erroneous. Let it be conceded that the refusal of the writs by the several judges, out of court and in vacation, was the judicial action of the court in term time, sitting within the Richmond district. Upon that hypothesis, the writs of error from the Supreme Court of the United States should have been directed to the Supreme Court of Appeals of Virginia. The writs were not so directed, but were directed to the corporation court, and therefore this court has no jurisdiction. The familiar practice of this court is to direct its writs to the Supreme Court of this State, as in the Richmond R. R. Co. vs. Louisa R. R. Co., 13 Howard, 71; Paul vs. Virginia, 8 Wal., 178; and Underwood vs. McVeigh, which last case is directly in point.

Another and final view is this: Either the supreme court of appeals of Virginia has acted on the judgments of the corporation court of Alexandria, or it has not. If it has, then the writ of this court should have been directed to that court. If it has not, then as that court was the highest court in the State having jurisdiction, and that court having never exercised jurisdiction, of course this court has no jurisdiction to revise a jurisdiction which has never been exercised.

With these views, I respectfully submit the cases in hand to the judgment of the court. If I have unnecessarily elaborated them, and if I have shown extraordinary zeal in the argument, I beg to be pardoned, under the exceptional circumstances of this long, multifarious, vexatious, and expensive litigation, which is without precedent in the administration of justice in the United States, and in which my sympathies for misfortune and old age, and my strong sense of the impropriety of the arbitrary proceedings in the District Court, by which a large property for more than ten years has been illegally taken and withheld from its suffering and injured owner, have inspired me to make a faithful effort to secure a rightful and final adjudication of the one really important question involved. *Interest reipublicæ ut sit finis litium.*

JOHN HOWARD,
For the defendant in error, W. N. McVeigh.

Richmond, Va., April 10th, 1875.

SUPREME COURT OF THE UNITED STATES.

FOREE, Trustee for Mrs. M. J. Underwood,
vs.
McVEIGH.

Brief of John Howard for defendant in error, on motion to dismiss for want of jurisdiction under the 25th section of the Judiciary Act.

While my brief in the Windsor & Gregory cases vs. McVeigh, No. 583 and No. 633, April term, 1875, was in press, and after nearly the whole of it had been printed in the above entitled cause, another writ of error was allowed by one of the judges of this court, directed to the Supreme Court of Appeals of Virginia, where it was received on the 15th day of April, 1875. As it is proposed to ask the court to hear and consider this case, together with the cases above mentioned which are now in its hands, some additional observations may be proper in respect to it.

It was the original and leading case, and there would seem to be peculiar propriety in hearing it with the others, at the present term, which, under the authority of *ex parte* Russell, 13 Wall., 671, it is presumed may be done, although the writ is returnable to the next October term. It is the same case, the history of which, in its different stages and phases, is given in the brief above referred to, and which was before the court at its October term, 1873, and was dismissed because the writ of error was directed to the corporation court of Alexandria, instead of to the supreme court of appeals, as was the present writ. The record of all the proceedings in the State court having been once printed, and copies placed in the hands of the judges, and the Federal question alleged to be raised being the identical question sought to be raised in the Windsor and Gregory cases, the court would perhaps dispense with the printing of the record again, in order to facilitate the hearing of the cause, and especially as the proceedings of the district court in confiscation, upon which the plaintiff in error relies as evidence

of the existence of a grant from the United States, are reported in 11 Wall., 267, and those proceedings, as well as the other facts showing actual fraud in the claim, are also reported in Underwood vs. McVeigh, 23 Gratt., p. 410, *et seq.*, and p. 431, *et seq.*, from the original record.

We move to dismiss the writs upon the following grounds:

I. That no Federal question was decided by the State court.

As in the cases of Windsor & Gregory vs. McVeigh, the record shows:

1. That no judicial seizure of the property ever was made.

2. That the accused owner whose property was sought to be confiscated appeared by counsel and filed his claim to the property and his answer to the libel of information; that his appearance, claim and answer was stricken out by order of the court, and that after the owner had thus been denied all opportunity to be heard in his defence, his property was condemned and forfeited by the Government and ordered to be sold.

3. That the person acting in the position of judge of the district court made the alleged decree of forfeiture of the *land* in question as if exercising the powers of a court of admiralty; that as a court of admiralty there was no jurisdiction to condemn and forfeit land or property on land; that the District Court, even if acting judicially as a court, could only exercise jurisdiction to condemn land while *sitting as a court of common law, with trial by jury*, and therefore its pretended action as a court of admiralty was void.

For these reasons we contend that the proceedings of forfeiture and sale in the District court were utter nullities, and that the State Court properly held that they did not constitute evidence sufficient to show the existence of any authority exercised by, or claimed under, the United States, and hence no Federal question is presented for adjudication here; but as these points are common to all the cases, and have been fully argued in my brief in the Windsor & Gregory cases, they need not now be reargued. The next point is peculiar to this Underwood-Force case.

4. The record shows, that the judge of the District court, after the dismissal by him of the owner of the property without a hearing, in effect became himself a party to the suit and interested in its proceedings; that having, so far as it appears, no property himself, and being in want of a house and home, he so conducted, in fraudulent combination with others, the execution of the decree of sale, that by a

palpable fraud he became the nominal purchaser of the property at less than *one-seventh of its value*, having the deed from the marshal made to his wife, and thus practically confirmed the fraudulent sale to himself in a cause in which, as judge, it was his duty to pass upon the validity of the sale. We say that such proceedings were not had in the exercise of any authority derived by him from the United States. It was a mere fraudulent usurpation of power, and worse than a nullity. But as the facts involved may be more properly set forth under the next head of this brief, which presents a distinct ground involving these facts, they will not be more particularly stated here.

II. The record must show that a Federal question was *necessarily* decided by the State Court, and if it appears from the record that the State court might have decided the case upon some other ground, this court has no jurisdiction, although it appears that a Federal question may have arisen and may have been decided. Railroad Co. vs. Rock, 4 Wall., 77, 181. In that case, among other questions, the case presented the question, whether the County Judge, who issued certain bonds, and the railroad company to whom they were issued, were guilty of fraud in the issue of the bonds. This court said that the State Court may have held the bonds void on the ground of fraud, and may have based its judgment on that ground, and that, if so, there was no pretence that such a ground involved any Federal question, and the writ of error was dismissed. And it is settled that if the judgment of the State Court can be sustained on other grounds than the one of supposed Federal cognizance, this court will not revise it even though it should be of opinion that a Federal question may also have been decided therein and decided erroneously. Rector vs. Ashley, 6 Wall., 142; Smith vs. Adsit, 16 Wall., 189; and see Cockroft vs. Vose, 14 Wall., p. 8; and the cluster of cases following that in the same volume, pp. 9–25; also, Klinger vs. State of Missouri, 13 Wall., p. 257, and West Tenn. Bank vs. Citizens Bank, *Ibid*, p. 432.

In this case it is abundantly clear from the record that the instruction which the State Court refused to give to the jury may have been considered as not a proper instruction upon grounds exclusive of any Federal question.

In the action of ejectment of McVeigh vs. John C. Underwood, M. J. Underwood, his wife, and Force, her trustee, (made trustee by conveyance by husband and wife after action brought, and then intervening with the wife as party), the court was asked by the Underwoods to instruct the jury that the sentence and decree of forfeiture, and the sale

and conveyance of the marshal, divested the right and title of McVeigh to his property during his natural life, and that as to that estate the jury must find for the defendants; which was the same instruction asked for in all the cases and refused. And the question is whether this refusal was error under the evidence before the jury showing actual fraud alike in the decree and in the sale. The facts, briefly stated, were that John C. Underwood, the judge of the District Court of the United States, (under whose proceedings he, his wife, and her trustee, claimed title as defendants in the ejectment), in the numerous confiscation cases in his court against the right and title of W. N. McVeigh, the plaintiff in the ejectment, had stricken the appearance, answer and claims of McVeigh from the files, and thus denied him an opportunity to be heard in his defence. And on the same day (the 10th of March, 1864,) proceeded to default him for non-appearance, and to declare his property in each of the cases condemned and forfeited to the Government, and entered an order for an immediate sale of the same, and that at the sale there was a corrupt conspiracy, or "ring," as the testimony calls it, (which the judge had originated), between the said judge, the marshal and the deputy marshal of his court, and three Congressmen from Massachusetts, (Oakes Ames, John B. Alley and Samuel Hooper), the object of which was to defraud Mr. McVeigh by putting up and purchasing all of his large real estate at mock auction, without real competition, and at a sacrifice, and dividing it up among themselves, which they accordingly did; the *locus in quo* in this case being worth from $20,000 to $25,000, and having at $1,300 fallen in the distribution to the lot of Mrs. M. J. Underwood, the wife of the judge, even of which small sum it does not appear that the United States treasury ever received one cent.

It was upon these undisputed facts that the above instruction was asked for and refused. The instruction either asked the court to ignore these facts, which were all the facts in the case, or it required the court to tell the jury that a palpable fraud perpetrated by a person in prostitution of a high judicial position, when set up by that party as a muniment of title against the owner, thus defrauded, had divested the owner of his property and had conferred it upon the perpetrator of the fraud and his family. By refusing the instruction the court in effect declined to ignore the facts proved before the jury, and declined to say that the fraud thus established had divested the title of the owner. If it was designed by asking for such an instruction to raise a Federal question for adjudication, were it possible that any such question could

be raised under the facts proved, the instruction should have asked the court to say that the alleged decree of forfeiture, and the sale made thereunder, divested the title of the owner, unless the jury should believe from the evidence that there was fraud in the said decree and in the said sale. That instruction, doubtless, the court would have given, just as it gave precisely similar instructions in the same case in respect to title claimed by the defendants under a judgment and sale had under certain attachment proceedings. But the defendants in ejectment had no right to ask the court to ignore the facts showing fraud, or to ask for an instruction exclusively based upon a particular part of the evidence, which was intimately blended and connected with the evidence as a whole, and which instruction, if given, would have been tantamount to telling the jury that the only facts proved before them were the decree, the sale, and the conveyance thereunder, and that all the other evidence in the cause amounted to nothing, and should be left out of consideration.

It is submitted, therefore, that the corporation court, upon principles too well established to require the citation of authority for their support, was clearly right in refusing the said instruction, and that no question of Federal jurisdiction was involved therein. It will be observed that the court did not instruct the jury that the decree, sale and conveyance *had not per se divested* the title of the owner. If such an instruction had been asked for by the plaintiff in ejectment, and given by the court, then, if at all, it might be said that the court had passed on the validity of the said decree, sale and conveyance, supposing these proceedings to have had any of the attributes of proceedings judicial in their nature; for an instruction to that effect would have been equivalent to saying to the jury that, independent and irrespective of the facts showing fraud in the whole transaction, the decree, sale and conveyance did not divest the title of the owner and confer it upon the defendants; but no such instruction was asked for by the plaintiff in ejectment or given by the court. On the contrary, the plaintiff asked for no instruction at all upon that point; and when the defendants asked for an instruction which would have excluded from the jury the facts showing fraud in the transaction, in addition to those which were inherent in the proceedings in the District Court, the plt'ff was content to go before the jury upon the fraud apparent upon the face of those proceedings (which had been introduced by the deft's), and which fraud was abundantly confirmed by the other facts in the cause. The parties went before the jury, upon those facts, without any instruction being given or refused, except the instruction

in question, which had simply refused to say, in substance, that the jury were excluded from considering any other facts than the special facts upon which it was based. The jury found a verdict for the plaintiff, upon the whole facts in the case, the confiscation record included; and the fraud was so clearly proved that no motion was made for a new trial upon the ground that the verdict was contrary to the law and the evidence, or upon any other ground. See 23 Grat., pp. 442, 443. If such a motion had been made and overruled, then the question would have arisen whether, upon the law and the facts, as set forth upon a proper bill of exceptions, the court erred in not setting aside the verdict, and that would have brought up for review the question whether, notwithstanding the fraud shown in the whole transaction, the confiscation proceedings divested the title of the owner and bestowed it upon the Underwoods; but nothing of the sort appears in the record.

It is true that the defendants in ejectment moved the court to exclude the depositions of Dane, Balderstone and Robinson, who proved the active complicity and participation of Judge John C. Underwood in the conspiracy to defraud Mr. McVeigh, under the shadow of proceedings in his court, and directed by him. But that point simply raised the question whether, in a collateral action, you can attack what purports to be a judgment or decree, and proceedings thereunder, for fraud inherent in or appearing upon the face of the judgment and sustained by facts proved *aliunde*. But that was a question to be decided, and which was decided, upon the principles of general jurisprudence; and the Supreme Court of Appeals of Virginia, in affirming the judgment of the corporation court, said: "That a judgment or decree obtained by fraud upon a court does not bind such court or any other; and its nullity on this ground, though it has not been reversed or set aside, may be alleged in a collateral proceeding." 23 Gratt., pp. 424, 425, citing Kerr on Fraud and Mistake, 293, 294; 11 Howard, 437; 5 Calif. R., 406; 63 Penn. R., 408; 62 Penn. R., 481; 3 Wash. C. C. R, 546 (Lessee of Cooper v. Golbraith—a case directly in point); and other cases, especially that of Rex vs. Duchess of Kingston, 20 How. St. T., 355, 544 (2 Smith's L. C., 687), and quoting the report of Lord Chief Justice De Grey to the House of Lords, that "fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts—ecclesiastical and temporal. In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior court or by the highest court of judicature; but in all cases alike, it is competent for every

court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud." Kerr on Fraud and Mistake, 294.

But here Judge Underwood was substantially the purchaser under a decree of his own court, in which he had denied the owner of a property a hearing, then condemned it and ordered it to be sold, and had bought it in at less than one-seventh of its value, at a pretended sale, the regularity and fairness of which it was his judicial business and duty to pass upon and decide. In such a case, the decree, sale and purchase was a judicial nullity, as well as a fraud; and it was admissible to prove the facts which showed that he had so acted, and that the title, if any, which he and his wife claimed was so derived.

"There is also a maxim of law regarding judicial action," says a learned author, "which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.' This maxim applies in all cases where judicial functions are exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of the judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation, and when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record." *Cooley's Constitutional Limitations*, p.p. 410, 411.

And if in a case (3, House of Lords, cases 759), in which the Lord High Chancellor of England, Lord Cottenham, so upright and eminent a judge, had inadvertently passed upon and affirmed a judgment of the Vice Chancellor, involving a corporation in which the Chancellor was a stockholder to a small amount, the House of Lords reversed the judgment of the Lord Chancellor on that ground alone, though it affirmed the judgment of the Vice Chancellor as right upon the merits, surely, the State courts of Virginia, in allowing evidence to be introduced proving actual judicial fraud in a judge, alike in his court and out of court, in divesting the property of a citizen and transferring it to himself, cannot be held to have decided a Federal question, merely because the judge involved was one of the judges of the United States.

The State court may have been right or wrong in refusing to instruct

the jury that the decree of a judge made after he has refused his adversary a hearing, and a sale made under that decree by order of the judge, at which he or his wife became the purchaser of the property at a grossly inadequate price, did not confer title upon the judge or his wife. Be that as it may, the United States had nothing to do with the matter. It would be a reflection upon the Government, to suppose that it recognized any such transaction as its own, or as done under its authority. The transaction was simply a fraud, perpetrated by a combination of persons who occupied positions in each of the departments of the Government, judicial, executive and legislative; but that fact did not make the fraudulent appropriation of the property of their victim the exercise of any authority conferred upon them by the United States.

We say, then, that not only does no Federal question arise in this case, but that if it clearly appeared from the record that a Federal question may have arisen, and may have been decided, yet that the facts before the State Court and jury prove that there had been an unconscionable fraud perpetrated as well upon the United States as upon the accused owner of the property in question, and that, therefore, the question of fraud being one of exclusive cognizance by the State Court, and the decision made being maintainable upon that ground, this court will not assume jurisdiction in the case under the 25th section of the judiciary act.

JOHN HOWARD,
For defendant in error.

Richmond, Va., April 17th, 1875.

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